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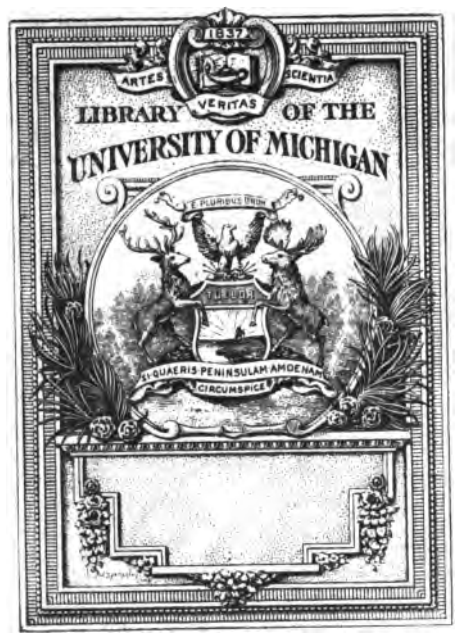
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THE FEDERAL POWER

OVER

CARRIERS AND CORPORATIONS


The MC Co.

THE FEDERAL POWER

OVER

CARRIERS AND CORPORATIONS

BY

E. PARMALEE PRENTICE

New York

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PREFACE

THE present work deals, as its title indicates, with the nature and extent of powers belonging to the general government, not with Congressional legislation. One statute, however, the Act of July 2, 1890, popularly known as the Sherman Anti-Trust Act, so closely concerns the principles of government that it has required a full consideration.

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It is common in discussing these questions largely to disregard the purposes which influenced the formation of our government and for a century directed its administration. Present questions, it is urged, are new, beyond the contemplation of the statesmen of a century ago, and new meanings must therefore be given to the Constitution. This is surely a most dangerous and mistaken notion.

The nature of man and the principles of government are not changed. Personal liberty is as precious as of old, and its preservation is still of first importance. The influences which endanger free government, and, if unrestrained, lead to the license of the mob or to arbitrary rule, are present in our, as in all other peoples. That so many persons are

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ready, without very serious consideration of the structure of government, to approve any method which seems to promise effective control of corporations, shows that the American people have so long lived in consciousness of complete safety for all private rights, that the methods by which, in the formation of the Constitution, individuals were protected against arbitrary power, seem no longer to demand attention. And yet it is perhaps in the light which history throws upon the science of government, that the past makes its most valuable contribution to the present. When this contribution is disregarded, when the past offers no guide, the future, in the words of one of the greatest American publicists, offers no security.

The Constitution is a historical document. Its meaning, and the interpretations it has received as the final adjudications of time and authority, can be determined only by taking the decisions which have construed its terms in connection with contemporaneous conditions, and by study of constitutional practice of States and Congress.

Cases of latest date, however, are commonly those which carry greatest authority. There has been a tendency, therefore, in reading opinions of the Supreme Court to accept each decision as a new point of departure. In consequence, some of the earlier

cases, upon which it is now sought to build further extensions of Federal power, — as, for example, the famous case of Gibbons *v.* Ogden, decided by Mr. Chief Justice Marshall in 1824, — have been quoted as establishing doctrines which their illustrious authors would have been first to deny.

This method of construction has never received the approval of the Supreme Court. The Constitution "speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States." This statement by Mr. Chief Justice Taney has lately been reaffirmed, when the Court, speaking by Mr. Justice Brewer, said, "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. . . . Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded." To depart from a constitutional rule, Mr. Justice Harlan said, delivering the opinion of the Court in another recent case, "is to endanger the safety and integrity of our institutions and make the Constitution mean not what it says, but what interested parties may wish it to mean at a particular time and under particular

circumstances. The supremacy of the law is the foundation rock upon which our institutions rest."

Constitutional construction can be accomplished, then, only by a full understanding of constitutional history. For such success as may attend the present effort to define powers of government, much is owing to the counsels of Mr. George Welwood Murray and Mr. Charles P. Howland.

E. P. P.

15 BROAD STREET, NEW YORK,
December, 1906.

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CHAPTER I

LOCAL SELF-GOVERNMENT AND PERSONAL LIBERTY

LOCAL self-government, it is said, is "part of the very nature of the race to which we belong." [1] Upon its maintenance depend the liberty and the rights of man in every government.[2] "Those who dread the license of the mob," De Tocqueville said, "and those who fear absolute power, ought alike to desire the gradual development of provincial liberties." . . . "A centralized administration is fit only to enervate the nations in which it exists," and he added, "I am also convinced that democratic nations are most likely to fall beneath the yoke of a centralized administration." [3]

There is no doubt whatever that the American republics, State and Federal, established to protect personal liberty and equal rights of all citizens, intended to place these rights, and local self-government as their security, forever beyond danger of invasion.

Other peoples at other times have established and administered government according to doctrines of political economy or notions of justice most advantageous

[1] Thomas M. Cooley, note to "Story on the Constitution," Sec. 280.
[2] Letter to Cabell, Jefferson's Works, Vol. VI, p. 543.
[3] "Democracy in America" (The Century Co., 1898), Ch. V, p. 99.

to the ruling class, so that it has been said that the history of public law is the history of ancient abuses. Governments so formed or administered have disappeared when the class they served ceased to rule. The American governments had no such origin. In their establishment doctrines of political economy and theories as to the distribution of wealth, "the most common and durable source of factions,"[1] were not permitted to interfere. The purpose of the framers was to rest government upon those essential principles of liberty which are the foundations of democracy and its assurance of permanence. This was the "great experiment upon the theory of human rights,"[2] and this it was thought had been accomplished by the division of powers between the States and the Federal government. The service performed by the framers of the Federal Constitution was that they devised a system whereby a national sovereignty might be endowed with energy and the forms and substance of popular liberty still be preserved. This they did, Mr. Curtis said, "without abolishing the State governments and without impairing a single personal right which existed before they began their work."[3]

For many years after the adoption of the Constitution, local jealousies, not only for State governments, but also for smaller municipal corporations, was such that apprehensions of centralization seemed baseless.

Very recently all this seems to have changed. Confidence in local government and jealousy for personal rights have given way to a popular movement for the

[1] *Federalist*, No. 45.
[2] First Annual Message, President J. Q. Adams.
[3] "Constitutional History," Ch. XVI, p. 265.

extension of Federal jurisdiction. It is not a coincidence merely, that the legislation thus brought forward invades private liberty at the same time that it supersedes long-established powers of local government. Local government is superseded for the purpose of restricting private right. The fundamental fact in which the new movement originates is that leaders of public opinion have returned to old world views of the functions of government. Liberty is no longer so far the object of popular solicitude as to prevent a widespread agitation for government in the interest of favorite doctrines of political economy.

This tendency appears in many Federal statutes, most conspicuously in the Anti-Trust Act and in the current proposals for trust regulation by means of license or compulsory Federal incorporation. These subjects, both for their intrinsic importance and because of their effect upon the form of society, deserve careful attention.

Federal incorporation and Federal license, in the form now advocated, differ only in detail. In one case the right of a corporation to engage in interstate commerce is to be dependent upon a Federal charter, in the other upon a Federal license; in both cases the corporate organization and administration are to be subject to effective Federal control, and the jurisdiction of Congress is to be extended over operations of production, manufacture, and distribution which hitherto have belonged to the States alone. In all commercial affairs conducted by corporations, complete centralization is to be substituted for the local self-government which hitherto has obtained.

Notwithstanding the serious opinion of responsible officers of government, that all this is well within the powers of Congress,[1] there is no doubt that the plan is entirely beyond the scope of the Constitution, inconsistent with its provisions and with the system of government which has existed in this country since the Revolution.[2]

In speaking of an effort by implication to extend Federal powers derived from the commerce clause so as to control the processes of manufacture within a State, the Supreme Court said: —

"The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed, and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite . . .; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether

[1] Report of Industrial Commission. Speech of Attorney-General Knox, at Pittsburg, copied in 36 Cong. Rec., p. 412. Report of Commissioner of Corporations, December, 1904.

[2] House Report No. 2491, 59th Cong., 1st Sess.

the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the State governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine." [1]

The establishment of Federal supremacy in commercial affairs involves, then, an alteration of fundamental relations between the States and the Federal government. Great as this change would be, the consequent alteration in the relation of the individual citizen to government is still greater.

Under the Constitution, the important personal rights of every individual, not residing in a territory or a colony, his personal liberty, family relations, and property rights, are derived from the State, not from Congress. Except when brought into connection with the army, the navy, the post-office, the tariff or internal revenue, most Americans have little actual contact with the Federal government. Because the State alone, therefore, could endanger private liberty, many and complicated provisions have been inserted in State Constitutions to secure individual freedom.

Upon the Federal government, on the other hand, few limitations have been imposed for the protection of individuals. The proposed method of trust regulation, then, which would take commercial jurisdiction from the States, where the powers of government are subject

[1] Kidd *v.* Pearson, 128 U.S. 1, 21, 22.

to established restrictions, and vest it in Congress, free from these limitations, is the establishment of a parliamentary despotism.

Nothing can be clearer than that such a power cannot be established under the Constitution.

By the system of government which has existed under that instrument the State and the Federal governments are limited, each within its sphere. A theory of construction which would develop an unlimited Congressional power over the activities of the citizen discloses its own vice — the assumption of powers which are unlimited, only because not granted.

Examination of this subject, at the present time, centres about the commerce clause of the Constitution, and involves not only consideration of its meaning and of its place in the scheme of government, but also requires consideration of the relations between State and Federal governments; of the nature of that personal liberty upon which the fathers placed so high a value, and of the extent to which government was permitted to interfere with individual activity.

Among the powers which the Constitution vests in Congress was one whose grant few opposed and from which no apprehensions were entertained.[1] This was "the simple power of regulating trade." [2] At a time when the powers given to Congress were "extorted from the grinding necessity of a reluctant people" [3] this

[1] *Federalist*, No. 45.
[2] Speech of William Symmes in Convention of Massachusetts, 2 Elliot Deb. 70.
[3] See Von Holst, "Constitutional History, 1750–1832," p. 63.

power was given by "the common consent of America." [1] Persons who opposed every other means to strengthen Congress consented to this grant. "Why not," it was asked, "give Congress power only to regulate trade?" [2]

For the greater part of the first century under the Constitution, the construction placed upon the power thus granted was such as to justify this attitude. The power was not of an absorbing nature, nor one whose possession enabled Congress to invade either the jurisdiction of the States or the personal liberty of individuals.

Under the influence of new economic views, however, the power seems wholly to have changed character. The right to engage in foreign and interstate commerce, it is now said, is derived solely from the Federal government, and upon this ground the effort has been made to establish Federal control over all, save a few of the smallest, industrial and transportation interests of the country.

If these two views of the Constitution represented merely the doctrines of present and opposing schools of constitutional construction, such a difference of opinion upon fundamental questions would still be unfortunate. If, however, this difference be not so much between schools as between present and past; if it mark a fundamental change in the national conception of the Constitution and in the spirit of its administration, the significance of the policy toward which the country is moving

[1] Speech of Robert Livingston in Convention of New York, 2 Elliot Deb. 214.

[2] Speech of Gen. Thompson in Convention of Massachusetts, 2 Elliot Deb. 80.

becomes apparent; for important as undoubtedly are the economic questions whose agitation has given rise to new constitutional doctrines, the preservation of the Constitution is more important still. "There is one point," Mr. Lecky said, "on which all the best observers in America, whether they admire or dislike democracy, seem agreed. It is, that it is absolutely essential to its safe working that there should be a written constitution, securing property and contract, placing serious obstacles in the way of organic changes, restricting the power of majorities, and preventing outbursts of mere temporary discontent, and mere casual coalitions from overthrowing the main pillars of the State. In America, such safeguards are largely and skilfully provided, and to this fact America mainly owes her stability." [1]

Unfortunately there seems to be a growing impatience with these very safeguards; a belief that the Constitution is not in all respects adequate to existing conditions, and that new powers should be assumed by and supported in the Federal government.[2] The statement of this proposition is probably its best answer, for there is no general desire to question the supremacy of the Constitution, either directly or by constructions which are recognized as unsound. It is still true, as Jefferson said, that to take a single step beyond the limits which the Constitution has fixed for Congress "is to take

[1] "Democracy and Liberty," Vol. I, p. 136.

[2] Even as conservative a lawyer as Judge Cooley at one time entertained this view, — see "Michigan," American Commonwealth Series, 346, but later changed his opinion, — see "Written and Prescriptive Constitutions," 2 *Harvard Law Review*, 341. On the general subject see "The Elasticity of the Constitution," by Mr. Arthur W. Machen, Jr., 14 *Harvard Law Review*, 200.

possession of a boundless field of power, no longer susceptible of any definition." [1] This Congressional supremacy is not advocated on any hand, nor is it sought to impose the ultimate authority upon Congress and the Supreme Court together. Participation in such a partnership is, in a democratic government, wholly incompatible with life tenure of office and sooner or later must destroy the authority of the judiciary.[2]

Rousseau said that popular government, more than any other, most strongly and constantly tends to change its form, and there is no government, therefore, which demands more courage and vigilance for its maintenance.[3]

If this tendency to change is to be resisted, and the Constitution is to continue in fact to be a fundamental law, certain and uniform; if the Federal government is to avoid that condition described by Mr. Justice Story as miserable servitude — the condition of legal administration where the past furnishes no guide and the future no security,[4] it is necessary to accept the Constitution as a historical document to be construed with reference to the purposes of its framers, and the history of its application.

[1] Opinion on U. S. Bank Bill. Jefferson's Writings (Ford), Vol. V, p. 285.

[2] The Constitution "speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day." Taney, C. J., in Scott *v.* Sanford, quoted in South Carolina *v.* United States, 199 U. S. 437.

[3] "Social Contract," Book III, Ch. IV.

[4] "Commentaries on the Constitution," Sec. 1259.

CHAPTER II

THE CONSTITUTIONAL CONVENTION

The purpose of the Commerce Clause. At the time the Constitution was formed and adopted, the United States contained a population scattered along the Atlantic seaboard, close to tide-water. Between these States thus situated there was no considerable communication by land. A large commerce was, however, conducted by sailing vessels with foreign nations and along the coast. To this trade the attention of the country was directed.

Its condition Bowdoin said was miserable. Other nations excluded American vessels from their ports or laid heavy duties on their cargoes, and Congress had no retaliating or regulating power to prevent it.[1] This then was the first evil which required a remedy. Congress must be vested with power to tax foreign commerce, to exclude foreign vessels, and to retaliate for hostile measures where this course was necessary.

The coasting trade, too, demanded relief from the burdens imposed by State tariffs and State navigation laws, and thus freed should be open to American vessels only. Foreign vessels might be authorized to go from

[1] Elliot Deb. Vol. II, p. 83.

port to port to complete delivery of a cargo,[1] but with this exception, domestic navigation should be secured to our own people.

So far as concerns regulation of commerce these were the specific purposes which the Constitution was intended to accomplish.

Proceedings of the Constitutional Convention. The history of the development of the constitutional provisions, by which the Convention accomplished these objects, is brief.

On May 29, 1787, Edmund Randolph introduced into the Convention a series of resolutions broadly outlining the nature of government proposed and the powers to be granted. This was known as the Virginia plan.

On the same day, Charles Pinckney also submitted a draft of a Federal government. Bancroft says of this that no part was preserved, and no part used.[2] It is clear that the paper which appears in Elliot's Debates under Pinckney's name is not the draft submitted by him to the Convention, but it is not difficult to determine, in outline, the nature of the government which he proposed, and in some directions to go much farther than this, and in a degree to reconstruct Pinckney's draft.[3] His proposals relating to commerce apparently were as follows: —

[1] "Principles on which a Commercial System for the United States should be Founded," read before the Society for Political Inquiries at the house of Benjamin Franklin, Philadelphia, May 11, 1787. Published anonymously, but credited to Tench Coxe.

[2] Bancroft, Vol. VI, p. 215; "Pamphlets on the Constitution," Paul Leicester Ford, p. 419.

[3] See "Studies in the History of the Federal Convention," by Professor John Franklin Jameson of the Carnegie Institution, Rep. Am. Hist. Ass'n, 1902; see also, "Sketch of Pinckney's Plan for a Constitution," *American Historical Review*, Vol. IX, p. 735; July, 1904.

"The legislature of the U.S. shall have the exclusive Power — of raising a military Land Force — of equipping a Navy — of rating and causing public Taxes to be levied — of regulating the Trade of the several States as well with foreign Nations as with each other — of levying duties upon Imports and exports — of establishing Post Offices and raising a Revenue from them — of regulating Indian Affairs," etc.

This plan, with Randolph's resolutions, was referred to a committee of the whole house, where the debate proceeded upon the framework of Randolph's resolution.

So far as concerned powers over commerce Randolph proposed

"That the national legislature ought to be empowered to enjoy the legislative right vested in Congress by the Confederation: and, moreover, to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."

This resolution, though general in form, was not intended as a proposition to grant an undefined jurisdiction to the new government. Upon this subject there was no division of opinion. Charles Pinckney and John Rutledge objected to the vagueness of the resolution, saying that "they could not well decide how to vote until they should see an exact enumeration of the powers comprehended by this definition." In this Pierce Butler agreed and Randolph himself "disclaimed any intention to give indefinite powers to the national legislature, declaring that he was opposed to such an inroad on the State jurisdictions." [1]

[1] Elliot Deb. 139.

At this stage of proceedings, indeed, it was impossible to do more than to state definitely the general purposes to be accomplished, and in this respect Randolph's resolution was explicit. It was intended that Congress should under the new government have all the powers which it had under the old; that in addition thereto such further powers should be granted as were necessary to prevent a continuation of the evils experienced under the Confederation, and that these new jurisdictions should all be enumerated, so that, as had been stated in Massachusetts, only "a well-guarded power to regulate trade" [1] should be intrusted to Congress.

The commercial powers vested in Congress by the Articles of Confederation included the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States; of fixing the standard of weights and measures throughout the United States; of regulating the trade and managing all affairs with the Indians not members of any of the States, provided, however, that the legislative right of a State within its own limits should not be infringed or violated; and, lastly, of establishing and regulating post-offices from one State to another through the United States, and exacting such postage on papers passing through the same as should be requisite to pay the expenses of the office.[2]

These powers, then, were all to belong to Congress under the Constitution.

The Articles of Confederation further provided that the people of each State should have free ingress and

[1] Bancroft, Vol. VI, p. 141.

[2] Article IX.

egress to and from any other State, and should enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions should not extend so far as to prevent the removal of property imported into any State to any other State of which the owner was an inhabitant.[1] States were prohibited also from laying imposts or duties which should interfere with any stipulation in treaties entered into by the United States with any king, prince, or state in pursuance of treaties which had been already proposed by Congress to the courts of France and Spain.[2]

The provisions last referred to, and contained in the fourth and sixth of the Articles of Confederation, vested no legislative rights in Congress and, therefore, were not strictly within the scope of Randolph's resolution.

That part of the sixth article which has been quoted is represented by a separate clause in the Constitution. The provision quoted from the fourth article, however, found no place in the Constitution, except such as has been given to it by implication.[3]

The subjects upon which the debates of the Convention principally turned, in the consideration of this resolution, were Federal taxation of exports, control of the slave trade, and the passage of a navigation act.

From the standpoint of the Northern States, Federal control of the slave trade was an indispensable necessity. The first great compromise of the Constitution, the inclusion of slaves in estimating population as a basis of representation, placed those States where slaves were

[1] Article IV. [2] Article VI. [3] Crandall *v.* Nevada, 6 Wall. 35.

few in number at an immediate disadvantage, and required for their future protection that some effective check should be placed upon the increase of slave population by importation.

Furthermore, the shipping interests of Northern States needed the protection of a navigation act, and the desire for this protection was one of their principal inducements to seek an amendment of the Articles of Confederation and a strengthening of the Federal government.

On the other hand, the Southern States desired slaves, and in North Carolina, South Carolina, and Georgia the slave trade was not prohibited; the Southern States had little interest in shipping, but were dependent upon their exports. They were concerned in procuring cheap transportation, not in the nationality of the vessel by which transportation was made. A tax upon exports was, therefore, out of the question, and a navigation act should require a two-thirds vote, lest, as Mason said, "a few rich merchants in Philadelphia, New York, and Boston might by that means monopolize the staples of the Southern States." [1]

On June 15, Paterson submitted several resolutions, which, taken together, have generally been known as the New Jersey plan. The second resolution outlining this plan, provided,

"That in addition to the powers vested in the United States in Congress by the existing Articles of Confederation they be authorized to pass acts for raising a revenue by laying a duty or duties on all goods and merchandise of foreign growth or manufacture

[1] Bancroft, Vol. VI, p. 364; "George Mason, Life, Correspondence and Speeches," Rowland, G. P. Putnam's Sons, 1892, Vol. II, pp. 175, 269; Madison Papers, Vol. III, p. 1593; Jefferson's Works, Vol. VI, p. 323.

imported into any port of the United States. To pass Acts for the regulation of trade and commerce as well with foreign nations as with each other"; etc.

The third resolution provided that none of the powers vested in Congress should be exercised without the consent of a certain number of States to be agreed upon.

These resolutions were without debate referred to a committee of the whole house, which four days later reported its disapproval. The debate upon Randolph's resolutions, therefore, continued until July 23rd, when the work of the Committee of the Whole was referred to a Committee of Detail to draft and submit a Constitution. On the following day the Committee of the Whole, to which the Pinckney and Paterson plans had been referred, was discharged from their consideration and they also were referred to the Committee of Detail.

The Pinckney plan was at no time separately considered. It appears to have been mentioned but once in the Convention, and then by its author. The Paterson plan had been disapproved. So far as the record goes, therefore, neither of these plans appears to have exercised much influence on the deliberations of the Convention. The fact probably was otherwise. "The reference of the New Jersey and Pinckney plans to the Committee of Detail was not, as has generally been assumed, a mere smothering of them. . . . Paterson's proposals for a power to lay duties on imports, to regulate commerce," and a number of other provisions, appear in the report of the Committee of Detail, though

not in the resolution of the Committee of the Whole. Pinckney's plan also appears to have contributed in a considerable degree to the instrument reported by the Committee of Detail.[1]

In the draft of Constitution submitted to the Convention by that Committee on August 6th, appears a draft of the commerce clause in nearly its present form. In this draft, among grants of power to Congress to raise revenue, coin money, to establish post-offices, post and military roads, and other grants upon related subjects, appears a grant of power in general terms to "regulate commerce with all nations and among the several States." The powers of Congress were, however, to be subject to the limitation that "no navigation act shall be passed without the assent of two-thirds of the members present in each house."

The difference in the wording indicates that the Committee considered other regulations of commerce besides a navigation act to be within the scope of the clause. The important acts of commercial regulation which were discussed, either before or after the meeting of the Convention, were the passage of a navigation act and the imposition of a tariff.[2] It is probable that the only regulations which the Committee had in view, beside these, related to navigation and were of a purely local character. Revenue being disposed of by separate provisions

[1] "Studies in the History of the Federal Convention," Professor John Franklin Jameson, Rep. Am. Hist. Ass'n, 1902.

[2] Proceedings of Congress Concerning Duties, Feb. 3, 1781; 3 Jour. of Cong. 572, 573; Proceedings of Congress as to Regulation of Commerce, April 30, 1784; 4 Jour. of Cong. 392, 393; Resolution to Empower Congress to Regulate Trade, Virginia House of Delegates, Nov. 30, 1785. See 4 Jour. of Cong. 621.

of the Constitution,[1] the subject of a navigation act covered the field of commercial regulation, so far as concerned matters of national interest.

The Committee also reported a number of restrictions both upon the Federal government and upon the States.

The revenue and commercial powers of Congress were to be limited by requiring uniformity of indirect taxes and apportionment of direct taxes; by forbidding taxation of articles exported from any State, and of the migration or importation of such persons as any State might think proper to admit. State taxation of imports, exports, and tonnage was also to be forbidden, and citizens of each State were to be protected in the enjoyment of the privileges and immunities of citizens in the several States.[2]

Taxation of exports, regulation of the slave trade, and passage of a navigation act came, therefore, before the Convention in the debate upon the report of this Committee. The first of these questions concerned the Federal power to tax exports. Southern States were interested in finding a market for their products. They had no interest in shipping, and General Pinckney expressed the views of Southern delegates when he said that it was the true interest of the South to have no regulation of commerce.[3] "Were it not," said Mercer, "for promoting the carrying trade of the Northern States, the Southern States could let the trade go into foreign bottoms," [4] a view strongly supported by Mason. A tax upon exports, therefore, was in any event out

[1] 5 How. 504, 594; 7 How. 479, 480, 549.
[2] Elliot, Vol. I, pp. 224, 230.
[3] *Ibid.* Vol. V, p. 489.
[4] *Ibid.* p. 433.

of the question, unless it were intended to reduce the States "to mere corporations."[1] After a discussion which continued until the 21st of August, the concession to the Southern States was then made, exempting exports from taxation, and on the next day the other matters were referred to a Grand Committee consisting of one member from each State. Of the negotiations at this point, Mr. Curtis says: —

"We know very little of the deliberations of this committee; but as each State was equally represented in it, and as the position of the different sectional objects is quite clear, we can have no difficulty in forming an opinion as to the motives and purposes of the settlement which resulted from their action, or in obtaining a right estimate of the result itself.

"In the first place, then, we are to remember the previous concessions already made by the Northern States, and the advantages resulting from them. These concessions were the representation of the slaves, and the exemption of exports from taxation. If the slaves had not been included in the system of representation, the Northern States could have had no political motive for acquiring the power to put an end to the slave-trade. If the exports of their staple productions had not been withdrawn from the revenue power, the Southern States could have had no very strong or special motive to draw them into the new Union; but with such an exemption they could derive benefits from the Constitution as great as those likely to be enjoyed by their Northern confederates. Both parties, therefore, entered the final committee of compromise with a strong desire to complete the Union, and to establish the new government. The Northern States wished for a full commercial power, including the slave-trade and navigation laws, to be dependent on the voices of a majority in Congress. The Southern States struggled to retain the right to import slaves, and to limit

[1] Elliot, Vol. V, p. 456.

the enactment of navigation laws to a vote of two-thirds. Both parties could be gratified only by conceding some portion of their respective demands.

"If the Northern States could accept a future, instead of an immediate, prohibition of the slave-trade, they could gain ultimately a full commercial power over all subjects, to be exercised by a national majority. If the Southern States could confide in a national majority, so far as to clothe them with full ultimate power to regulate commerce, they could obtain the continuance of the slave-trade for a limited period. Such in reality was the adjustment made," [1] and the report of this committee, leaving the control of navigation with a majority of Congress, and giving the Federal government power to prohibit the slave-trade after the year 1800, — a date subsequently changed to 1808, — forms the second great compromise of the Constitution."

In the course of the debate upon the extent of the commercial power to be given the Federal government, many grants were discussed aside from the powers of regulation and taxation.

On the 18th of August it appears from the report in Elliot that it was proposed to give Congress power to grant charters of incorporation in cases where the public good may require them, and the authority of a single State may be incompetent; to regulate stages on the post-roads; to regulate affairs with the Indians; and to establish institutions for the promotion of agriculture, commerce, trade, and manufactures. On the 14th of September a motion was made by Franklin that Congress be given power "to provide for cutting canals." Such a power, Wilson said, was necessary in order to

[1] Curtis, "Constitutional History," Vol. I, pp. 509–510. See speech of Alexander Hamilton in New York Convention, Elliot Deb., Vol. II, pp. 235–236.

prevent a single State from obstructing the general welfare. The motion was lost on the ground that the expense thereby incurred would be a general burden, while the benefit would be local.

The brief outline of proceedings given above indicates that in the course of the debates, members of the Convention considered broad grants of commercial power; that as the session neared its close, powers were considered which would have conferred authority to make internal improvements, to charter a bank, and over many other subjects which have been prominent in constitutional history.

All motions to make these grants in express terms were lost, so that finally the commerce clause was adopted substantially in its original form, the limitation upon the power of a majority of Congress being removed, and the words "and with the Indian tribes" being added.

The important fact in reference to Federal regulation of commerce which appears from the history of the proceedings of the Convention is that the Federal power is not a broad, general jurisdiction, but was given as a definite authority to accomplish specific purposes. An "exact enumeration of powers" was intended.

The purpose to avoid indefiniteness appears in many provisions of the completed instrument. Congress, for example, is not only given power to coin money, but specific authority is added, to regulate the value thereof and of foreign coin, and to punish counterfeiting. General power is given to declare war, and specific authority is added to grant letters of marque and reprisal, to make rules for the government of land and naval forces, and

rules concerning captures on land and water. A general power is given to call forth the militia to execute the laws of the Union, and there is added specific power to suppress insurrections. Power to regulate commerce, then, was not given as an indefinite authority, but was intended as a specific authority to effect certain well-understood ends.

The great purposes which it was sought by the Constitution to accomplish were four in number. It was necessary to establish a federal authority capable of raising a federal revenue, to manage foreign relations, to prevent the imposition of duties by particular States upon articles brought from other countries, or from or through other States, and to control navigation. These four great purposes were each covered by express provision.

Power to raise a revenue from foreign commerce was granted by the provision that Congress may impose taxes, duties, imposts, and excises, subject, however, to the restrictions that duties, imposts, and excises be uniform throughout the country and that direct taxation be apportioned to the population. Power to manage foreign relations was given by the provision, among others, which authorized the executive, with the Senate, to make treaties. The prevention of duties by particular States was accomplished by express prohibition of State taxation of exports and imports. Federal control of navigation was given by the commerce clause, subject, however, to the restrictions that no preference be given to ports of one State over those of another, and that vessels bound to or from one State be not obliged to enter, clear, or pay duties in another.

This, then, was the power, — a definite authority subject to express restrictions coextensive with the power granted.

The liberty to engage in commerce. Several constitutional provisions help to define the field of operation for this power so briefly given to Congress.

The Fourth Article of the Constitution provides that

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The Fifth Amendment, that

"No person shall . . . be deprived of life, liberty or property, without due process of law."

The Fourteenth Amendment protects the liberty of every person against invasion by State authority.

It is the singular good fortune of the Constitution that it was founded during that short period when political ideas were those of the completest individual liberty, — "while the jealousy of power was strong, and the love of liberty and of right was ardent." [1] "If we examine the present state of the world," James Winthrop said, "we shall find that most of the business is done in the freest states, and that industry decreases in proportion to the rigor of government." [2] This was not the spirit of the old régime, when industry was a privilege acquired by license from government or by the election of a guild,[3]

[1] Ruffin, C. J., in Hoke *v.* Henderson, 4 Dev. (N. C.) 12 (1833).

[2] Letter of James Winthrop (Agrippa) in *Massachusetts Gazette*, Nov. 23, 1787; Ford, "Essays on the Constitution," 53, 55.

[3] Lecky, "Democracy and Liberty," Vol. II, p. 243. See remarks of Senator Hayne of South Carolina, April 30, 1824. Annals of Congress, 18th Cong., 1st Sess., Vol. I, p. 623.

and it may not be the spirit of the new régime, under which organizations not unlike the guilds have arisen, and the revival of governmental license is proposed. Industrial liberty for the modern world was the discovery of the seventeenth and eighteenth centuries, and its security, with all other rights, which together constitute freedom, was the great purpose of American governments.

To this end provisions were inserted in State Constitutions, declaring and protecting the inalienable rights of man. No such provisions were inserted in the Federal Constitution, for there they were unnecessary. The liberty of the citizen was protected by the State, not by the United States. This, said Alexander Contee Hanson, results from the nature of a Federal republic, which consists of "an assemblage of distinct States, each completely organized for the protection of its own citizens." [1] The rights of private citizens, James Bowdoin said, are not "the object or subject of the Constitution." [2]

The States, then, it was answered, should accept the Constitution upon the express condition that nothing therein deprive a citizen of the rights given to him by

[1] "Remarks," published in Ford, "Pamphlets on the Constitution," 221, 241; letter of Elbridge Gerry in *Connecticut Courant*, Dec. 10, 1787.

[2] 2 Elliot Deb. 87. "The American system rests on the assertion of the equal right of every man to life, liberty, and the pursuit of happiness, to freedom of conscience, to the culture and exercise of all his faculties. As a consequence the State government is limited — as to the General Government in the interest of union, as to the individual citizen in the interest of freedom." First annual message of President Johnson. For George Bancroft's part in the authorship of this message, see article by Professor William A. Dunning of Columbia University, "More Light on Andrew Johnson," *American Historical Review*, Vol. 11, p. 547, April, 1906. Also communication by Mr. Carl Russell Fish, "President Johnson's First Annual Message," *ibid.* p. 951, July, 1906.

the State in which he resides,[1] or the Constitution should be amended so as to protect every individual in the enjoyment of rights derived from the States. Such conditional acceptance or amendment was unnecessary, but to satisfy doubts, not to alter the operation of the Constitution,[2] the amendments known as the Bill of Rights were proposed in 1789 and soon after adopted.

By these amendments the provision of the Constitution giving to citizens of each State all the privileges and immunities of citizens of the several States[3] was supplemented by a long list of rights not to be infringed, including provisions, not restricted to the protection of citizens, which enact that no person — that is, as the word is construed, no citizen, alien, or corporation — shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation;[4] and that the enumeration of certain rights shall not be construed to deny or disparage others retained by the States or by the people.[5]

What are the privileges, immunities, liberties, and rights of property thus protected? For these expressions, which have a long history in English law, attempts have been made to establish a somewhat technical mean-

[1] See letter by James Winthrop in *Massachusetts Gazette*, Feb. 5, 1788, Ford, "Essays on the Constitution," 119.

[2] The preamble adopted with these amendments by Congress reads: "The conventions of a number of the States having at the time of adopting the Constitution expressed a desire, in order to prevent misconstruction and abuse of its powers, that further declaratory and restrictive clauses be added; and as extending the grounds of public confidence in the government will best ensure the beneficent ends of its institution, resolved," etc. See "Constitutionality of the Anti-Trust Act," by Mr. William D. Guthrie, 11 *Harvard Law Review*, 80, 83.

[3] Article IV, § 2. [4] Fifth Amendment. [5] Ninth Amendment.

ing which would so restrict their operation as only to forbid arbitrary executions, imprisonments, and forfeitures.[1] This view comes from a partial consideration of the subject. English history and the development of English law centre about the growth of individual liberty. To give to the provisions in the American Constitution which protect individual rights the meaning which they would have had for Norman lawyers, or for lawyers of the English monarchy, is wholly to misinterpret the purposes of the instrument.

There are, however, authorities which hold that even in early law the word "liberty" referred not merely to freedom from arbitrary imprisonment, but included also industrial liberty so far as it existed. "In a sense, all the rights secured by Magna Carta were 'liberties'; but the word is probably used here as equivalent to 'franchises,' embracing feudal jurisdictions, immunities, and privileges of various sorts, all treated by mediæval law as falling within the category of property." [2] "These words have always been taken to extend to freedom of trade." [3] From this beginning, the growth of civil, religious, and political rights may in part be traced, but liberty comes in part only from England. The American declarations of rights, Professor Jellinek says, "enumerate a much larger number of rights than the English declarations, and look upon these rights as innate and inalienable. Whence comes this conception in American law? It is not from the English law." [4]

[1] "The Meaning of the Word Liberty," 4 *Harvard Law Review*, 365.
[2] McKechnie, "Magna Carta," 445.
[3] Parker, C. J., in Mitchel *v.* Reynolds, 1 P. Wms. 181 (1711).
[4] Jellinek, "Rights of Man and Citizens" (Holt), Ch. VI, p. 56.

Partly, perhaps, consciously or unconsciously, these new rights and new ideas are results of life in the new world. Conditions in America, where every settler had to rely upon himself for safety as well as sustenance, where relations to others were comparatively slight and to government hardly felt, made individual liberty of the widest character a fact of daily experience. Industry as a privilege, or as less than an inalienable right would have been a difficult conception to introduce. Moreover, "the men who founded the American republics, State and Federal, were not seeking to imitate Great Britain. They set out to establish institutions such as they thought England ought to have, and not those which they found existing." [1]

Much of the discussion of the formative period seems, as is often noticed, to be of French rather than English origin.[2] That there should have been such an influence seems natural. French and Americans had been allies, — their troops had served in the same armies, men of the two nations had closely associated at the time when the attention of the French nation was absorbed by political discussions, and above all by Rousseau.[3] American ideas were carried back to France by the

[1] Campbell, "The Puritan in Holland, England, and America," Vol. I, pp. 53–54.

[2] Morley, "Rousseau," Introduction; Borgeaud, "Adoption and Amendment of Constitutions," 19.

[3] "We have never seen in our own generation — indeed the world has not seen more than once or twice in all the course of history — a literature which has exercised such prodigious influence over the minds of men, over every cast and shade of intellect, as that which emanated from Rousseau between 1749 and 1762." Maine, "Ancient Law," 84. Hume, writing from Paris in 1756, said: "It is impossible to express or imagine the enthusiasm of the nation in his favor; . . . no person ever so much engaged their attention as Rousseau." Buckle, "Hist. Civ. Eng.," Vol. II, pp. 330, 331, notes 12, 13.

troops who served here;[1] so that a declaration of the "rights of man" was known as "une idée américaine,"[2] introducing, in Lafayette's phrase, "the American era."[3] It would seem inevitable that the current French political discussion should be introduced into America, and that, at the close of the Revolution, many persons in this country, like Aaron Burr,[4] should be interested in French political theories, and for the same reason, — because introduced to this literature by French friends; yet it is one of the surprises of American history that the current of influence at this time seems to have flowed in one direction only. America influenced France, but it was not until later that France influenced America.[5]

It is quite possible, however, to trace the rise of the doctrines under whose influence the Constitution was formed, without recourse to France.

The Revolution was not a quarrel between two

[1] Buckle, "Hist. Civ. Eng." (N. Y. 1894), Vol. II, p. 417, note 211.

[2] Dumont, "Souvenirs sur Mirabeau," 97.

[3] "L'ère de la révolution américaine, qu'on peut regarder comme le commencement d'un nouvel ordre social pour le monde entier, est à proprement parler l'ère des déclarations des droits. . . . Ce n'est donc qu'aprés le commencement de l'ère américaine, qu'il a été question de définir indépendamment de tout ordre préexistant, les droits que la nature a départis à chaque homme, droits tellement inhérens à son existence, que le société entière n'a pas le droit de l'en priver." Lafayette, "Memoirs, Correspondances et Manuscrits," Bruxelles, 1837, Vol. II, p. 45. Jellinek, "Rights of Man and of Citizens." See "The French Declaration of the Rights of Man," by Professor James Harvey Robinson, of Columbia University, *Political Science Quarterly*, Vol. 14, p. 653; also the recent discussion of this subject in France, "La Declaration des Droits de l'Homme et du Citoyen," Emile Walch (Paris, 1903, Henri Jouve); "Montesquieu et J. J. Rousseau," by J. Tschernoff (Paris, 1903, Librarie Marescq Ainé); Boutmy, article in "Annales de l'École Libre des Sciences Politiques," 1902, p. 414.

[4] Parton, "Life of Burr," 1st ed., 132.

[5] "Rousseau in Philadelphia," by Mr. Lewis Rosenthal, 12 *Magazine of American History*, 46; Merriam, "American Political Theories;" Borgeaud, "Adoption and Amendment of Constitutions;" Lee, "Letter of a Federal Farmer," Ford, Pamphlets on the Constitution, 290.

peoples, but between two parties, — the conservatives in England and America on one side, the liberals in both countries on the other side. In England the party of monarchy was successful. In the colonies democratic institutions were established, and it was for the preservation of these institutions that the war was fought.[1]

The political doctrines of America were the doctrines of the Parliamentary party in England, Puritan in character, partly of Calvinistic origin and to this extent like much of Rousseau's speculation, derived from the democracy of Geneva. "The first indications of these religious-political ideas can be traced far back, for they were not created by the Reformation. But the practice which developed," in America, "on the basis of these ideas was something unique. For the first time in history social compacts, by which states are founded, were not merely demanded, they were actually concluded." [2]

Instances of this influence are found in the efforts of Cromwell's army to establish by popular vote an instrument of government superior to the authority of Parliament; and in the statutes adopted in early days of Rhode Island and Connecticut by general vote of the colonists. The idea from which the practice grew, Borgeaud says, was that to establish government, as to found a congregation, the consent of all concerned was necessary. "When the democratic communities of New England became veritable States, the Puritan conception, taken up and systematized by philosophy,

[1] "The Revolution Impending," by Mr. Mellen Chamberlain, in "Narrative and Critical History of America," Vol. VI, pp. 1, 2.
[2] Jellinek, "Rights of Man," 61, 62.

had become the theory of the social contract. Under this new form it presided over the formation and establishment of American constitutions of the Revolutionary period, constitutions whose most perfect expression was that adopted by Massachusetts in 1780. . . . It was by virtue of the formula which Jean Jacques Rousseau has rendered famous, but which the Anglo-Saxons had not learned from him, that this Constitution was submitted to all the citizens of the State." [1]

The political writers who had the greatest influence in forming American opinion, and whose works were most quoted in this country, were Locke and Algernon Sidney. The principles upon which the American Revolution was conducted, came largely from them,[2] and their influence in the constitutional period is strongly marked.

Both of these writers had defined liberty and property as including the right of industry. Locke said: —

"Though the earth, and all inferior creatures be common to all men, yet every man has a 'property' in his own 'person.' This nobody has any right to but himself. The 'labour' of his body, and the 'work' of his hands, we may say, are properly his." [3]

So Algernon Sidney: —

"Property also is an appendage to liberty; and 't is as impossible for a man to have a right to lands or goods, if he has no liberty, and enjoys his life only at the pleasure of another, as it is to enjoy either, when he is deprived of them." [4]

[1] Borgeaud, "Adoption and Amendment of Constitutions," 138.
[2] Fiske, "Critical Period," 64.
[3] Second Treatise on Government, Ch. V, § 27.
[4] "Discourses on Government," Ch. III, Sec. 16; see, too, Adam Smith, "Wealth of Nations," Bk. I, Ch. X, Part II; Thiers, "De la Propriété," 36, 37.

The American governments were formed when the influence of this philosophy was at its height. James Iredell, afterward Associate Justice of the Supreme Court, said in the Convention of North Carolina that he believed the passion for liberty was stronger in America than in any other country in the world.[1] "We hold these truths to be self-evident, that all men were created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." Of these statements in the Declaration, the Supreme Court has said that while they "may not have the force of organic law, or be made the basis of judicial decision as to the limits of rights and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." [2]

In State constitutions the doctrines of individual freedom were still more fully declared. The Bill of Rights of Virginia, adopted in 1776, secured —

"The enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

New Hampshire in 1784 and again in 1792 prefaced its Constitution with the statements that —

"All men have certain natural, essential, and inherent rights, among which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and in a word, of seeking and obtaining happiness."

[1] Elliot Deb. 95. [2] Gulf, etc., Ry. Co. *v.* Ellis, 165 U. S. 150, 159–160.

Similar expressions are in the constitutions of most of the other States. The Constitution of Missouri some years afterward, instead of referring generally to the right of acquiring and possessing property, includes among the inalienable rights of individuals "life, liberty, the enjoyment of the fruits of their own labor and the pursuit of happiness," a phrase which was modified so as to protect individuals in "the enjoyment of the gains of their own industry." Upon this subject the Constitution of Kentucky still later, in words which recall Lafayette's expressions,[1] said that "absolute power over the lives, liberty, and property of persons exists nowhere in a republic, not even in the largest majority."

In all these broad phrases, law-makers used, not the language of Norman law, but spoke, as Fisher Ames said of the Federal Constitution, in "the language of philosophy." [2]

The purpose to secure individual liberty — a controlling purpose of the communities which framed and adopted the Constitution — inheres, then, not only in its preamble, but in the operating provisions by which this purpose was made effective. Among the most important of these provisions are those securing the right of industry. "The right to make contracts," William H. Crawford said, "is antecedent to and independent of all municipal law." [3] Early in the history of the government the Federal courts held that the privileges and immunities of citizenship included "the right of a citizen

[1] "Memoirs, Correspondances et Manuscrits" (Bruxelles, 1837), Vol. II, p. 45.

[2] 2 Elliot Deb. 155.

[3] Speech in Senate, Feb. 20, 1811; Annals 11th Cong., 3d Sess., pl. 340.

of one State to pass through, or to reside in any other State, for purposes of trade . . . or otherwise." [1] In Gibbons *v.* Ogden the Supreme Court, speaking by Mr. Chief Justice Marshall, held that the right of intercourse between State and State was not granted by the Federal Constitution, but "derives its source from those laws whose authority is acknowledged by civilized man throughout the world." [2]

That is, in other words, the right to engage in interstate commerce is part of the inalienable liberty which, according to the philosophy of that time, has a higher source than the Constitution itself, and whose protection is one of the chief purposes for which government is instituted. Political theories have changed since this decision, but the Constitution remains, and the rights which it was formed to protect still have its assurance.

Under the influence of slavery the meaning of the word "liberty" was much restricted. It proved to be true, for the white as for the black, that the Union could not remain half slave and half free. This narrowing influence is no longer felt, and again liberty is "the greatest of all rights," [3] including all rights necessary for the maintenance and security of every person, and among others the right to engage in commerce. The Fourteenth Amendment then marks a return to the earlier constitutional views. It "conferred no new and additional rights, but only extended the protection of the Federal Constitution over rights of life, liberty, and

[1] Corfield *v.* Coryell, 4 Wash. C. C. Rep. 381; Ward *v.* Maryland, 12 Wall. 418, 430.
[2] 9 Wheat. 1, 211.
[3] Jacobson *v.* Massachusetts, 197 U. S. 11, 27.

property that previously existed under all State constitutions." [1]

Under this amendment liberty "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned," [2] and in so doing to move freely from State to State.[3] "The right to follow any of the common occupations of life is an inalienable right." [4]

The right to engage in commerce is, then, part of the liberty derived from the States, which neither the United States [5] nor the States [6] may deny. There is no process of law by which the right may be taken. As the right is derived from State law,[7] it belongs to those to whom the State gives it, whether citizen, alien, or corporation. The protection of the Fifth and Fourteenth Amendments belongs to all persons, and cannot be disregarded

[1] Mobile & Ohio R. R. *v.* Tennessee, 153 U. S. 486, 506.

[2] Allgeyer *v.* Louisiana, 165 U. S. 578, 589; Pavesich *v.* New England Life Ins. Co., 50 S. E. Rep. 68; City of Chicago *v.* Netcher, 55 N. E. Rep. 707; Kellyville Coal Co. *v.* Harrier, 69 N. E. Rep. 927; Erdman *v.* Mitchell, 56 Atl. Rep. 327; State *v.* Dodge, 56 Atl. Rep. 983; State *v.* Ashbrook, 55 S. W. Rep. 627.

[3] Williams *v.* Fears, 179 U. S. 270.

[4] Opinion of Mr. Justice Bradley in Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 746, 762, approved in 165 U. S. 578, 589.

[5] Fifth Amendment. [6] Fourteenth Amendment.

[7] Gibbons *v.* Ogden, 9 Wheat. 1; Bowman *v.* Railroad Co., 115 U. S. 611.

in respect to those artificial entities called corporations any more than in respect to the individuals who compose them.[1] The right to engage in commerce is a franchise which, being granted by another sovereign, is beyond Federal jurisdiction either to prohibit or to tax.[2] In this matter the authority of the State is complete, and beyond Federal control, — a distribution of power which results from the nature of a Federal republic, "an assemblage of distinct States, each completely organized for the protection of its own citizens." [3]

The exercise of this constitutional right, derived from State law, to engage in commerce, is necessarily subject to two limitations. The first of these is, of course, the wide Federal jurisdiction in foreign affairs.[4] The second limitation is in the power of police regulation, which belongs to Congress, and which has been exercised, for example, in the statutes forbidding transportation of articles which, by the commercial usage of nations, are not legitimate subjects of commerce. Congress, that is, has a discretionary power, within constitutional limits, so to regulate commerce as to accom-

[1] Gulf, Colorado, etc., Co. *v.* Ellis, 165 U. S. 150, 154; United States *v.* Northwestern Express Co., 164 U. S. 686, 689; Covington, etc., Co. *v.* Sandford, 164 U. S. 578, 592; Coffeyville Vitrified Brick Co. *v.* Perry, 76 Pac. Rep. 848; State *v.* Missouri Tie Co., 80 S. W. Rep. 933. "Every individual or entity which has rights or the capacity to owe duties is a person. In the strict legal sense the word person refers to the capacity, character or status of the being rather than to the man or entity." James Wilson's Works, Vol. II, p. 3, note 1. 1 Austin's Jurisprudence 362.

[2] Louisville, etc., Co. *v.* Kentucky, 188 U. S. 385; Pacific Railroad Cases, 127 U. S. 1, 40.

[3] A. C. Hanson, "Remarks," published in Ford, "Pamphlets on the Constitution," 221, 241.

[4] "Every person by the common law of each State, may export his property to foreign countries, at pleasure; but Congress, in pursuance of the power of regulating trade, may prohibit the exportation of commodities," etc. Hamilton, Opinion on Bank Bill, Feb. 23, 1791.

plish the purposes for which the Federal jurisdiction was created. Carriers may be required to give rest, water, and food to live stock; transportation of infected articles may be forbidden, and impediments to intercourse among the States may be removed. In all this legislation, however, there is no question of the person for or by whom commerce is conducted. The subject regulated is that portion of commerce given to Congress, and in the exercise of this power, as in the exercise of its other powers, Congress is subject to all the limitations imposed by the Constitution.[1] Congress cannot deprive any person of liberty, exclude proper articles from interstate transportation,[2] nor distinguish between proper occupations by reason of the personality of shipper or consignee. Some rights in every free government are beyond control of the state. "A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism." [3]

The two powers, State and Federal, must, in the language of Senator Wells, "keep company," and "every application of . . . power, by the United States, which has a tendency to embarrass or impair the free exercise of the power reserved to the States, is unwarranted, and

[1] Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 336.

[2] *Ex parte* Jackson, 96 U. S. 727, 735; *In re* Rapier, 143 U. S. 110, 133; Speech of Wm. M. Evarts in Senate, Jan. 13, 1887, Cong. Rec., 49th Cong., 2d Sess., Vol. XVIII, Part 1, p. 603.

[3] Loan Association *v.* Topeka, 20 Wall. 655, 662; Opinion of Justice Beck in Hanson *v.* Vernon, 27 Iowa 28, 73, approved in State *v.* Mayor, etc., of Des Moines, 103 Iowa 76.

if done . . . with a view to such a purpose, is the affair of arrogance and usurpation." [1]

Taxation of imports and exports. Under the Constitution as originally formed, and for many years administered, Congress had no jurisdiction over transportation from State to State save as conducted by coastwise navigation.[2] Interstate transportation was left to the States, Congress being forbidden to tax articles exported from any State and the States forbidden to tax imports or exports. The restriction upon the States, Randolph said, Congress might keep "undiminished" in operation by legislation under the commerce clause, but beyond this, Federal power did not extend. Congress being then without jurisdiction over carriage among the States, there was no need to provide that it should not tax or prohibit such transportation, for Congress had no power to which such a restriction could apply.

Federal power, then, never extended so far as to enable Congress to close interstate roads; but this defect of power is not all. Besides this, Congress is subject to the express provision forbidding taxation of exports, and this provision should not only prevent taxation of the goods carried, but should forbid taxation of interstate transportation,[3] and as applied to interstate commerce may well be held to prevent Federal prohibition.

The rule of the Constitution was free ships and free goods. Congress was, indeed, permitted to tax imports

[1] Senator Wm. H. Wells, of Delaware, April 1, 1816, Annals 14th Cong., 1st Sess., Vol. I, p. 259.

[2] *Post*, Chapter III.

[3] State Freight Tax Case, 15 Wall. 232.

from abroad. It was intended to raise a Federal revenue under the Constitution from a tariff upon foreign commerce, but upon commerce among the States no tax could be laid. The Southern States were not interested in the carrying trade, but were vitally interested in preserving access to the markets of the world for their staple products. Their most important market was Europe, and foreign commerce was chiefly considered in the debates; but even then the South contemplated the time when Northern States would be an important market, and the reason for prohibiting Federal taxation of exports was, said a member of the Convention, in order that the planter should "receive the true value of his product wherever it may be shipped." [1]

All this would probably be accepted without question, were it not for the opinion rendered by the Supreme Court in 1868 in the case of Woodruff *v.* Parham.[2] This case holds that a State may tax articles brought from other States while still in first hands and original packages. The rule is necessary. Under any other, as the Court said, a "merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions, employed for half a lifetime, and escape all State, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York."

It would have been sufficient answer to such a claim had the Court applied to this clause the interpretation which is now placed upon the commerce clause in cases

[1] Williamson in *State Gazette* of North Carolina, Ford, "Essays on the Constitution," 393. [2] 8 Wall. 123.

involving State taxation, and held that goods can claim no preference from equal burdens by reason of foreign origin or because brought from another State. Adapting the language used in another connection [1] it may be said that a provision forbidding taxation of articles brought from other States or countries "does not require that any bounty be given therefor." The Court, however, went further than this and held that the words "imports" and "exports" applied only to foreign trade, a rule which has been followed in later cases.[2] "It is not too much to say," Mr. Justice Miller remarked in delivering the opinion of the Court, and referring to the debates of the constitutional period, "that, so far as our research has extended, neither the word export, import, or impost is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant." [3]

This decision, from which Mr. Justice Nelson dissented, completely reversed the rule which up to that time had generally been accepted. Mr. Chief Justice Marshall [4] and Mr. Justice Story [5] had both understood the words to include foreign and interstate commerce alike, and the Supreme Court itself, in a decision ren-

[1] Cornell *v.* Coyne, 192 U. S. 426.

[2] Hinson *v.* Lott, 8 Wall. 148; Brown *v.* Houston, 114 U. S. 622; Pittsburg Coal Co. *v.* Louisiana, 156 U. S. 590; Fairbank *v.* United States, 181 U. S. 283; Preston *v.* Finley, 72 Fed. Rep. 850; State *v.* Pittsburg, etc., Coal Co., 41 La. Ann. 465; *Ex parte* Martin, 7 Nev. 140.

[3] Woodruff *v.* Parham, 8 Wall. 123, 136.

[4] Brown *v.* Maryland, 12 Wheat. 445.

[5] "Commentaries on the Constitution," § 1016.

dered by Mr. Chief Justice Taney, had so applied them.[1] In some respects time and experience of the workings of the Constitution give later generations better opportunities for practical understanding of that instrument than were open to its framers, but it is not likely that in 1868 the language of the Constitution could better be understood than in earlier times. The definitions given by Mr. Justice Miller, therefore, have not generally been accepted as convincing.

"Before the adoption of the Constitution, and therefore at the time when it was framed, and its phraseology discussed, an article brought from Pennsylvania to North Carolina would have been said to be imported into North Carolina, and a tax on it would have been called an 'import tax.' It is difficult to say by what other name such a tax, if it could be laid, would be now styled." [2] Members of the Supreme Court have expressed the same view. Mr. Chief Justice Fuller, in a dissenting opinion in which Justices Brewer, Shiras, and Peckham agreed, said that although this provision of the Constitution had been restricted in application to exports to a foreign country "it was plainly intended to apply to interstate exportation as well." [3] Notwithstanding these dissenting views, the decisions [4] indicate that the rule which in Woodruff *v.* Parham was applied to the clause forbidding the States to tax exports and imports, may also be applied to the clause forbidding

[1] Almy *v.* California, 24 How. 169.
[2] American Fertilizing Co. *v.* Board of Agriculture, 43 Fed. Rep. 609, 612.
[3] Lottery Case, 188 U. S. 321, 373.
[4] Turpin *v.* Burgess, 117 U. S. 504; Dooley *v.* United States, 183 U. S. 151, 154; Cornell *v.* Coyne, 192 U. S. 418, 427; American Steel & Wire Co. *v.* Speed, 192 U. S. 500.

Congress to tax exports from any State, although this clause is so worded as apparently to exclude such construction. In view of these dissensions the wording of the provision deserves attention.

When a governmental power over imports and exports is discussed, the words naturally refer to the territorial boundaries of the government whose powers are considered. Thus the New York statutes speak of articles manufactured in the city of Hudson "or imported or brought into the said city from any place whatsoever," [1] and similar references are made to importations into the city of Albany,[2] to exportations from Albany, Saratoga, or Rensselaer counties to points south of Albany,[3] and to exports from Suffolk, Kings, and Queens counties.[4] In all these cases the words "imports" and "exports" relate to county and municipal boundaries. The English statutes speak of exportations from a particular port, and as so used the word refers to all goods taken out of that port, including those carried in the conduct of the coasting trade to other ports in England.[5] To prohibit a State in general terms to tax imports or exports would, therefore, in the natural meaning of the words, refer to the territorial boundaries of the power thus limited and would forbid taxing articles carried across State lines. A similar restriction upon the power of the Federal government would forbid taxing articles carried across national lines. If it were sought to ex-

[1] Act of Jan. 26, 1793, Laws of 1789–1796, Ch. 22, p. 414.
[2] Act of April 3, 1790, *ibid.* Ch. 47, p. 175.
[3] Act of April 3, 1797, Laws of 1797–1800, Ch. 94, p. 128.
[4] Act of April 4, 1800, Laws of 1797–1800, Ch. 93, p. 547.
[5] Muller *v.* Baldwin, L. R. 9 Q. B. 457; Barrett *v.* Stockton, etc., R. Co. 2 M. & G. 163; 3 M. & G. 956; 11 Cl. & F. 590.

tend this prohibition so as to prevent Federal taxation of articles carried across State lines, the wording of the prohibition should be made with specific reference to the boundaries, not of the Federal government, but of the States. This in fact is the form of the constitutional limitation upon Federal power.

The States are forbidden in general terms to lay any tax or duty upon imports or exports, while upon the powers of the Federal government the limitation is made with express reference to State boundaries. No tax or duty, it is said, shall be laid by Congress "upon articles exported from any State." Here, then, the Constitution used such a special form of words as the Court in Woodruff *v.* Parham considered appropriate to designate commerce among the States.

Verbal criticism apart, however, it appears that in the common use of the terms, so far as concerned jurisdiction over goods carried across State lines, each State at the time of the formation of the Constitution was foreign to every other.[1] All commerce, then, except that which was entirely within each State, was foreign commerce. In Massachusetts, for example, where several statutes required inspection of lumber shipped "for exportation to foreign markets" or "exported beyond sea," it was enacted on March 16, 1784, that this term "shall be considered and understood to extend to any port or place not within this Commonwealth." This statute does not purport to amend the acts to which it refers, nor to alter their application, but solely to define the terms employed. The word "foreign" was capable

[1] Commonwealth *v.* King, 1 Whart. (Pa.) 448.

of different meanings, of which Massachusetts adopted the broadest. Under this construction even the rule of Woodruff *v.* Parham would apply the constitutional restrictions upon State and Federal power to interstate as well as to international commerce. In general, the words "imports" and "exports" when used without express restriction appear in Massachusetts to have included all trade crossing the State line.[1]

That the Massachusetts rule prevailed also in other States is shown by the construction placed upon the Pennsylvania statute of 1759 for the inspection of lumber.

This statute, after reciting that "the reputation of this province hath been much advanced by the care of the legislature to prevent frauds and abuses in divers commodities of our country produce exported to foreign markets," proceeds to enact among other things "that no merchant . . . shall . . . take or put on board any ship or vessel for exportation out of this province, any staves, heading, boards, planks, or lumber" before inspection thereof as provided by the statute.

In Shuster *v.* Ash,[2] decided by the Supreme Court of Pennsylvania in 1824, it was held that this statute, although enacted in avowed contemplation of "foreign markets," applied to a shipment of staves from Philadelphia to Wilmington. The court said:—

"It cannot be denied that the case falls within the words of the law, because, although the proprietaries of Pennsylvania were also proprietaries of the three lower counties of New Castle, Kent,

[1] Act of July 11, 1783, Perpetual Laws, Vol. I, p. 103; Act of March 31, 1788, *ibid.* p. 415; Act of Feb. 26, 1794, *ibid.* Vol. II, p. 336; Act of Feb. 27, 1795, *ibid.* p. 272.

[2] 11 S. & R. 90.

and Sussex on the Delaware, and both were under the same governor, yet the legislatures of the province and counties were, in the year 1759, totally independent of each other, and so continued until the Revolution in 1776, when each became a sovereign, independent State. But, it is contended, that the intent of the act, is explained by the preamble, which is confined to an exportation to *foreign markets*. If the question had rested on the expression *foreign markets*, the defendant would have had much to say for himself, though even then, it would not have been far from difficulty. A country governed by the same king would not, strictly speaking, be a *foreign country*. And yet without doubt an exportation to the British West India Islands, must have been considered as within the provision of the act, because the principal markets for staves, etc. were in those islands, and yet, they were subject to the same king as Pennsylvania. Construing the word, *foreign*, with greater latitude, it might extend to all countries beyond sea, without considering whether subject to the same sovereign or not, and carrying its signification to its utmost extent, it might include all countries and governments, other than the province of Pennsylvania, wherever situate. The main intent of the act was, to make Pennsylvania staves more valuable by keeping up their character in consequence of their quality. The same observation applies to all other articles, which by various laws were made subject to inspection, — such as bread and flour, beef and pork, butter and lard, bark, fish, flaxseed, etc. I have examined all these acts and they are expressed, pretty much as the one now under consideration. They prohibit exportation *out of the province*, or (since the Revolution,) *out of the State*. The words, *out of the province* are so plain, that they seem manifestly intended to define the limits beyond which all markets should be deemed *foreign markets*. Unless we adhere to the line prescribed by the act, (the boundary of the province,) where are we to stop, and what exceptions are we to make? New Jersey is as near to us as Delaware — and Maryland joins both Delaware and Pennsylvania. The counsel for the plaintiff, says, that none of the old thirteen colonies of Great Britain, which afterwards confederated and established

their independence, could be called foreign markets within the meaning of this act of assembly. Now see to what this would lead. Pennsylvania exported large quantities of flour, to the eastward and southward — to Massachusetts and the Carolinas. Was it not of great importance, that the character of her staple, should be kept up in those markets? And is it not of great importance still? The coasting trade is of immense value. . . .

"So that we shall find, upon reflection, that our ancestors knew what they were doing when they used the words *out of the province*, and this will appear more clearly when we advert to an act passed in the year 1721, 'For the well tanning and currying of leather,' etc. This act declares 'that it shall not be lawful for any person or persons to lade, ship, or carry, in any ship or vessel . . . with intent to transport, or convey the same to any place or places out of the province, except such as may be carried to the province of New Jersey, and counties of New Castle, Kent and Sussex on Delaware' . . . etc., etc. This shows that the Legislature considered New Jersey, and the counties on Delaware, as embraced by the expressions out of the province, and, therefore it was, that they expressly excepted them.

"The other colonies, pursued, in their inspection laws, the same policy as Pennsylvania. Each took care of itself, and considered its neighbors *quo ad hoc* as *foreigners*. The counsel for the plaintiff cited the laws of Connecticut with respect to beef and pork. And I have examined the act for the inspection of tobacco, passed in Maryland in the year 1763. The words are these, 'all tobacco which shall be exported out of this province shall be . . . inspected.'"

This stringent rule which made all States foreign was perhaps not invariable. An exception is suggested by comparing three statutes passed by the State of New York in March, 1787. These statutes are similar in form. The first,[1] after reciting that "butter and hogs'

[1] Act of March 1, 1788, Laws 1785–1788, Ch. 53, p. 717.

lard have become articles of great exportation from this State, and it is necessary the exportation thereof be regulated," makes provision for inspection of butter and lard to be "exported from this State." The second statute [1] provides for inspection of beef and pork. The third,[2] passed on the same day with the second, after reciting that "staves and heading have become articles of considerable exportation from this State, and it is necessary that great care be taken to preserve their reputation at foreign markets," enacts that "no staves or heading shall be exported out of this State to any foreign market, but such as shall be culled . . .," etc.

The difference in the wording of statutes otherwise so much alike appears to indicate that the word "foreign" in this instance was employed to prevent the application of the general terms in the statute to commerce with other States. That the words when used in the New York statutes without such limitation would apply to interstate trade is shown by the Act of March 22, 1784,[3] imposing duties in general terms "on the importation of certain goods, wares and merchandise," but excepting the product "of the United States of America or any of them." Similar provisions exist in other statutes,[4] and unless limited the words ordinarily applied to all imports and exports, — foreign or interstate.[5]

In Connecticut a duty of twopence was imposed "for

[1] Act of March 7, 1788, *ibid.* Ch. 55, p. 719. [2] *Ibid.* Ch. 56, p. 723.
[3] Laws of 1777–1784, Ch. 10, p. 599.
[4] Act of April 11, 1787, Laws of 1785–1788, Ch. 81, p. 509; Act of March 12, 1788, *ibid.* Ch. 72, p. 786.
[5] Act of March 16, 1785, Laws of 1785–1788, Ch. 35, p. 66; Act of May 4, 1786, *ibid.* Ch. 61, p. 320; Act of April 2, 1799, Laws of 1797–1800, Ch. 88, p. 439.

every gallon of rum . . . imported" into the State. That this general law applied to interstate trade is shown by the fact that an allowance was made for wastage in transit which was fixed at "five per cent. for rum imported directly from the West Indies, and two per cent. for rum imported from the neighboring States." [1] This law was subsequently amended so that no duty was payable on rum not sold in the State, "provided, nevertheless, that nothing in this Act shall be construed to exempt rum exported out of this State northward by way of Connecticut River," etc.[2] In other words, Connecticut taxed the traffic of Western Massachusetts, Vermont, and New Hampshire, but did not intend to drive from its ports commerce on its way to New York and Rhode Island.

The same meaning of the words "exports" and "imports" appears in many other statutes, of which but a few need be cited.[3]

The constitutional provision must, then, have been intended, as was said by Mr. Justice McLean, to prohibit Federal taxation of interstate commerce. "A revenue to the general government could never have been contemplated from any regulation of commerce among the several States. Countervailing duties, under the Confederation, were imposed by the different States to such an extent as to endanger the confederacy. But this

[1] Laws of 1786, p. 210.

[2] *Ibid.* p. 326.

[3] *Connecticut*, Laws of 1786, p. 245; Laws of 1796, p. 321. *New Hampshire*, Act of June 21, 1785; Laws of 1792, p. 313; Act of Dec. 28, 1791; Laws of 1797, p. 381. *Virginia*, Act of Dec. 26, 1792; Laws of 1803, pp. 241–242, sec. 3; Act of Dec. 28, 1795; Laws of 1803, p. 352; Act of Jan. 27, 1802; Laws of 1803, p. 430. *South Carolina*, "Imposts" Act of Dec. 12, 1795.

cannot be done under the Constitution by Congress, in whom the power to regulate commerce among the States is vested." [1]

Nature of the federal power. From the foregoing review, it appears that the right to engage in commerce is derived from the States and that though Congress is given a power of regulation, it was nevertheless intended that the right itself should be beyond any governmental invasion, — an element of personal liberty which the States could not deny nor the United States impair.

It is obvious, however, that there is a difference in the nature of Federal powers over foreign, Indian and interstate commerce. That Federal authority over these three branches of commerce, being given in the same words and in the same clause, is co-extensive, has often been assumed both in Congress [2] and sometimes in opinions of members of the Supreme Court.[3] This view is, however, inconsistent with the express provisions of the Constitution and with the general scheme of the instrument.

The States of the Union are not known to foreign nations. So far as relates to other countries, American

[1] McLean, J., in License Cases, 5 How. (U. S.) 504, 594; Taney, C. J., in Passenger Cases, 7 How. 479, 480; Woodbury, J., *ibid.* 549.

[2] Speech of John Sergeant of Pennsylvania in House, Feb. 26, 1828, Cong. Deb., Vol. IV, Part II, 1642–1643; William Smith of South Carolina in Senate April 11, 1828, Cong. Deb., Vol. IV, Part I, 647; Taylor of Virginia in Senate, April 22, 1824, Annals 18th Cong., 1st Sess., Vol. I, 561; Louis McLane of Delaware in House, Jan. 27, 1824, Annals 18th Cong., 1st Sess., Vol. I, 1222–1224; Gold of New York in House, Annals 14th Cong., 2d Sess., 878. Daniel Sheffey of Virginia in House, February, 1817, Annals 14th Cong., 2d Sess., 889.

[3] License Cases, 5 How. 577, 578; United States *v.* 43 Gallons of Whiskey, 93 U. S. 194; Crutcher *v.* Kentucky, 141 U. S. 47; Buttfield *v.* Stranahan, 192 U. S. 470; United States *v.* Popper, 98 Fed. 423.

commerce is national in character, and is conducted under Federal authority and protection alone.[1]

In foreign relations the general government stands in the place of and represents every State for every national purpose. It may exercise its control over foreign commerce to retaliate upon an unfriendly nation, or injure an enemy; to influence international negotiations, or to avoid being drawn into unnecessary quarrels. An embargo of foreign commerce may, therefore, be proper, for the Federal government, if compelled to grant or to continue its authority and protection in all conditions, could not control its own foreign relations.[2]

As to commerce among the States, no such considerations arise.[3] Here the subject is presented solely as between the individual, and State and Federal governments. It is not affected by international considerations, nor does the United States in these relations take the place of, or represent, a State or State laws.

This difference between the powers of regulation over foreign and over interstate commerce has been recognized from the beginning.

Madison, reviewing in the *Federalist* the objects to be accomplished by the new Constitution, mentions, after protection against foreign enemies, the "regulation of intercourse with foreign nations" — a power to be exercised by taxation, exclusion, and, where necessary, retaliation — and the "maintenance of harmony and proper intercourse among the States." In other words,

[1] Lord *v.* S. S. Co., 102 U. S. 541.
[2] *Federalist*, No. 11.
[3] See speech of William H. Crawford in Senate, Feb. 11, 1811, Annals 11th Cong., 3d Sess., 139.

the power of regulation, however broad it might be in relation to foreign commerce, meant, as among the States, a power to maintain intercourse.[1] Its purpose as elsewhere stated in the *Federalist* was "to establish an unrestrained intercourse between the States," [2] "on the basis of equal privileges." [3] This, very clearly, was the intention of the framers of the Constitution,[4] and the history of the exercise of these powers emphasizes the necessary difference between them.

In regulating foreign commerce, the national power is limited by the equal power of the foreign government. In interstate commerce, Congress is limited by the constitutional rights of citizens. In Indian commerce, neither of these limitations appears, and the Federal power is as nearly as possible without restriction. These distinctions, which are obvious, show that the language of the Court, in the cases to which reference has been made, was not intended for general application, but in each case was used with regard only to the facts then before the Court. It is common knowledge that there are respects in which the powers differ. Chinamen may be excluded from California, and Indians may be forbidden to go to Texas,[5] but over citizens no such powers exist. Members of the Supreme Court when the subject has arisen, have called attention to the difference:—

[1] Speech of John Randolph in House, Jan. 30, 1824, Annals 18th Cong., 1st Sess., Vol. I, p. 1299; Senator Morgan, May 28, 1890, Cong. Rec., 51st Cong., 1st Sess., Vol. 21, Part 6, p. 5369; speech of William M. Evarts in Senate, Jan. 13, 1887, 49th Cong., 2d Sess., Vol. 18, Cong. Rec., Part I, p. 603.

[2] No. 41.

[3] *Federalist*, No. 11.

[4] *Federalist*, No. 7.

[5] Act of May 11, 1880, 21 U. S. Stat. 131.

"It is argued that the power to regulate commerce among the several States is the same as the power to regulate commerce with foreign nations, and among the Indian tribes. But is its scope the same? . . . The power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken *diverso intuitu*, for the latter was intended to secure equality and freedom in commercial intercourse as between the States, not to permit the creation of impediments to such intercourse, while the former clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the States. The laws which would be necessary and proper in the one case would not be necessary or proper in the other." This "does not challenge the legislative power of a sovereign nation to exclude foreign persons or commodities, or place an embargo, perhaps not permanent, upon foreign ships or manufactures. The same view must be taken as to commerce with Indian tribes. There is no reservation of police powers or any other to a foreign nation, or to an Indian tribe, and the scope of the power is not the same as that over interstate commerce." [1]

Transportation from State to State of legitimate articles of commerce cannot be forbidden.[2] Congress is authorized to regulate, not to destroy, commerce among the States.[3]

[1] Opinion of Mr. Chief Justice Fuller and Justices Shiras, Brewer, and Peckham in Lottery Case, 188 U. S. 373, 374; opinion of Mr. Justice McLean in Groves *v.* Slaughter, 15 Pet. 505; License Cases, 5 How. 504, 505; United States *v.* Cisna, 1 McLean 254. See House Report No. 2491, 59th Cong., 1st Sess.

[2] *Ex parte* Jackson, 96 U. S. 727, 735; *In re* Rapier, 143 U. S. 110, 133. House Report 2491, 59th Cong., 1st Sess.

[3] Woodruff *v.* Mining Co., 18 Fed. 753, 778; Railroad Commission Cases, 116 U. S. 307, 331. "The federal power is a power to interpose, and to remove whatever of obstructions or restrictions may have been imposed upon commercial intercourse with and between the several States, by local State legislation." Senator Foot of Vermont, Jan. 15, 1866, Cong. Globe, 39th Cong., 1st Sess., Part I, p. 229.

In thus measuring the Federal power, it is immaterial whether commerce be conducted by natural individuals or by corporations. "This government is neither a party nor is it a wisher in regard to the results . . . that come out of the development of commerce or the changes of its methods, except that this government deals with this very subject itself of commerce, in the interest of commerce." [1]

The Federal power, that is, so far as it exists, is not personal, but is founded upon its jurisdiction over commerce. If Congress may impose a given requirement, its commands are obligatory upon all, including alike natural persons and corporations. If it be without power over the commerce which it is proposed to control, the power cannot be acquired by asserting a wider jurisdiction over corporations, for this jurisdiction belongs to the States, not to Congress. Using the phrase employed by Mr. Justice Grier in another connection, it may be said that it is not reasonable either that those who deal with corporations or the corporations themselves should be deprived of valuable rights "by a syllogism or rather by sophism which deals subtly with words and names, without regard to the things or persons they are used to represent." [2]

"At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company

[1] Senator William M. Evarts, Jan. 13, 1887, 49th Cong., 2d Sess., Vol. 18, Cong. Rec., Part I, p. 603.

[2] Marshall *v.* Baltimore & Ohio R. R. Co., 16 How. 314, 327, 328.

may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. . . . The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations."

The Constitution looked not at form but at substance, and the substantial purpose which it was intended to accomplish was that commerce among the States should be free, by whomsoever conducted.

The purpose of constitutional construction. It needs no argument to show that upon the maintenance of this distinction between Federal powers over foreign and over interstate commerce, depends the continued existence of our constitutional system of government. If Congress may treat separate States as foreign nations, the powers which were given to the Federal government for common protection against external enemies are sufficient to control the domestic policy of every State.

In a commercial people control of commerce is closely associated with political questions, and sometimes, under this pressure, it has been proposed to use the ample Federal powers to accomplish results entirely beyond Federal jurisdiction, and as to which in the phrase employed by Senator Evarts, Congress should not be a "wisher."

Such a proposition is found in the recent suggestions that Congress control the States in the exercise of their

[1] Paul *v.* Virginia, 8 Wall. 168.

power of incorporation by excluding from interstate commerce all corporations except such as should comply with the requirements which Congress might set up as conditions for the issue of a Federal license.[1]

The question is, therefore, presented of the purpose of constitutional interpretation. The Supreme Court has often held, in passing upon the validity of State laws, that the courts will look into the operation and effect of a statute to discern its purpose,[2] and that if laws purporting to be enacted in the exercise of powers belonging to the State have no real or substantial relation to the objects of those powers, it is the duty of the Court so to adjudge and thereby give effect to the Constitution.[3] The same rule which tests the validity of State legislation determines also the validity of legislation by Congress.

"The propriety of a law, in a constitutional light," Hamilton said, "must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced construction of its authority, (which, indeed cannot easily be imagined), the Federal legislature should attempt to vary the law of descent in any State; would it not be evident that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State? Suppose, again, that upon the pretence of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a State; would it not be equally

[1] Report of Commissioner of Corporations, December, 1904.

[2] Henderson *v.* Mayor, etc., of New York, 92 U. S. 259, 268; Railroad Co. *v.* Husen, 95 U. S. 472; Collins *v.* New Hampshire, 171 U. S. 30; Reid *v.* Colorado, 187 U. S. 137; Compagnie Française *v.* State Board of Health, 186 U. S. 380.

[3] Mugler *v.* Kansas, 123 U. S. 623, 661; Minnesota *v.* Barber, 136 U. S. 313; Hennington *v.* Georgia, 163 U. S. 299, 303; Scott *v.* Donald, 165 U. S. 58.

evident, that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which the Constitution plainly supposes to exist in the State governments?" [1]

To these illustrations many others may be added. Unless Federal powers are limited to the effectuation of constitutional purposes, the authority to raise and support armies may be made a means of controlling municipal elections, and jurisdiction over navigable waters may control appointment or election to State offices, — in short, if Congress "may use a power granted for one purpose for the accomplishment of another and very different purpose, it is easy to show that a constitution on parchment is worth nothing." [2]

There is no constitutional authority for this method of construction. "Should Congress," said Mr. Chief Justice Marshall, "under the pretext of exercising its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." [3] The Federal government was given the powers necessary or proper to enable it to accomplish the purposes for which it was created. The fact that a power could be used both for constitutional and unconstitutional purposes was not a reason for withholding it from the Federal government. "No power, of any kind or degree, can be given but what may be

[1] *Federalist*, No. 33.

[2] Senator Hayne, April 30, 1824. Annals 18th Cong., 1st Sess., Vol. I, p. 648.

[3] McCulloch *v.* Maryland, 4 Wheat. 423; Hoke *v.* Henderson, 4 Dev. (N. C.) 12.

abused; we have, therefore, only to consider whether any particular power is absolutely necessary. If it be, the power must be given, and we must run the risk of the abuse, considering our risk of this evil as one of the conditions of the imperfect state of human nature, where there is no good without the mixture of some evil." [1]

The framers of the Constitution, then, in every instance, granted powers "commensurate to the object" to be attained.[2]

That every power given should, as Algernon Sidney said, be employed "wholly for the accomplishment of the ends for which it was given" [3] is, therefore, the one essential principle which applies to every Federal jurisdiction. Unless this principle be accepted "no power could be delegated; nor could government of any sort subsist." [4] To those opponents of the Constitution who were not satisfied with this appeal to necessity and to the honesty of government, and who insisted that Congress, being the judge of the necessity and propriety of its acts, might pass "any act, which it may deem expedient for any . . . purpose," Hanson replied "that every judge in the Union, whether of Federal or State appointment . . . will have a right to reject any act, handed to him as a law, which he may conceive repugnant to the Constitution." [5]

Further security against the perversion of powers to

[1] Remarks on James Iredell in Convention of North Carolina, 4 Elliot Deb. 95.
[2] Edmund Randolph in Convention of Virginia, 3 Elliot Deb. 70.
[3] Discourses on Government, Ch. I, Sec. I.
[4] James Bowdoin, Convention of Massachusetts, 2 Elliot Deb. 84–85.
[5] A. C. Hanson, "Remarks," in Ford, "Pamphlets on the Constitution," 217, 234.

unintended purposes could not be given. Should these principles of constitutional construction ever be abandoned, should the Constitution be made as broad as the results which Federal powers may accomplish, and then in turn these powers be extended to serve the needs of the new government thus created, it is obvious that the Constitution has ceased to exist.[1]

No such methods of construction have yet been sanctioned. It is still true, as Hamilton said, that "the propriety of a law in a constitutional sense, must always be determined by the nature of the power upon which it is founded."

It is clear, then, that the Constitutional Convention did not intend to give Congress power to tax or to prohibit commerce among the States, and that the nature of the power upon which it is sought to found such a jurisdiction fails to support it. As Mr. Chief Justice Fuller very forcibly remarked, "under the Articles of Confederation the States might have interdicted interstate trade, yet when they surrendered the power to deal with commerce as between themselves to the General Government, it was undoubtedly in order to form a more perfect union by freeing such commerce from State discrimination, and not to transfer the power of restriction." [2]

[1] "Every implication of a grant" (of power to Congress) "is confined to such as are direct and both necessary and proper, in the usual and natural acceptation of the terms, else it leads to unlimited power. Every means becomes in its turn an end, and thus justifies the use of means still more remote, until absolute power is attained." Resolution of Legislature of South Carolina; adopted Dec. 18, 1840; copied in Cong. Globe, 26th Cong., 2d Sess., Vol. IX, p. 123, Jan. 25, 1841.

[2] Lottery Case, 188 U. S. pp. 371–372.

CHAPTER III

GIBBONS *v.* OGDEN

THE first decision of the Supreme Court upon the commerce clause of the Constitution, rendered over eighty years ago in the case of Gibbons *v.* Ogden,[1] deals with a question now commonly considered a product of recent conditions, — the question as to the extent of Federal control over interstate carriers and over monopolies of interstate commerce.

The decision may, in its effect upon the structure of government, prove to be the most important of all the many cases which have yet been decided by that great tribunal. It has been cited and approved many times; whether cited or not, its doctrine, as that doctrine is now understood, is the accepted basis of all decisions upon the portion of the Constitution which is developing more rapidly and is the subject of a larger number of cases than any other.

It would be expected that a case of controlling authority, so often considered, would long ago have found its place in constitutional history; but for some reason not readily apparent, the case has received no adequate critical examination, although recent developments —

[1] 9 Wheat. 1.

notably in the Northern Securities Case, and in the suggestions made by the Commissioner of Corporations, on Dec. 21, 1904, in his first annual report — give the subject an increasing practical importance. The words of the decision have been literally applied, but no effort appears to have been made to learn its significance historically.

Interstate transportation by land was, to a considerable extent, originally instituted, and for many years after the adoption of the Constitution supported, by the establishment of monopolies.

A hundred years ago the commerce of the country was almost entirely limited to the foreign and coasting trade. The only roads which existed led from the woods to the principal towns on navigable waters. There was but one connected route from North to South at the commencement of the Revolution,[1] and this was true also when the Constitution was framed.[2] Even in 1796 the only roads with which the States were much concerned were those which led to navigable waters; the care of "cross-roads," as the roads leading from State to State were called by one who had been a member of the Constitutional Convention, the States were unwilling to assume.[3] "Fifty miles back from the waters of the Atlantic the country was an unbroken jungle."[4] In the vigorous phrase used by Henry Clay, "the country had

[1] Views of President Monroe on Internal Improvements enclosed in Message to Congress of May 4, 1822.

[2] Christopher Colles, "Survey of the Roads of the United States" (N. Y., 1789).

[3] Speech of Abraham Baldwin, Feb. 11, 1796. Annals 4th Cong., 1st Sess., 314.

[4] McMaster, "Hist. Am. People," Vol. I, p. 4.

scarcely any interior." [1] Turnpike roads did not come into general use until the nineteenth century.[2] Meanwhile, as the population increased and pushed further inland, a demand grew up for better means of land communication. Shays's Rebellion and the Whiskey Rebellion showed the political necessity, and commercial and social needs were even greater. Under these conditions there was but one way in which communication could be introduced. The States could not establish and operate lines of coaches, build bridges, and maintain ferries. Taxation for these purposes would not have been borne. Transportation must pay for itself, and this could be accomplished only by the creation of monopolies. If persons could be found, willing to establish a service where there were no improved roads and little or no travel, it was considered good public policy to encourage the establishment of the service by giving exclusive rights. Monopolies were, therefore, granted in every direction and by every State. The Latin phrase, *periculum privatum, utilitas publica,* which appeared on the seal of the first railroad company incorporated in England, seems to have expressed the views not only of those who engaged in that particular enterprise, but also the public opinion of America, as well as of England, in regard to ventures in the way of providing transportation generally.

The leader of this movement in the Middle and Eastern States was one Levi Pease, of Shrewsbury, Mas-

[1] Speech in House of Representatives, Jan. 30, 1824. Annals 18th Cong., 1st Sess., Vol. I, 1315.

[2] Report of Committee to House of Representatives, February, 1817. Annals 14th Cong. 2d Sess., 929; Hadley, "Railroad Transportation," p. 26.

sachusetts, a famous man in his day, but now as little known as are the annals of stage-coach travel. He was the sole projector of the mail stage establishment of the Federal government, and was long engaged in superintending the various branches of the system. It is not easy at this time to learn how far his control extended, but perhaps there has been no time when the transportation interests of a large section of the country seemed so to be within the hands of a single individual, as when, in the early days of the nineteenth century, these interests of the Eastern States were in his management. Notwithstanding this fact there was no public opposition to his control, and when he died it was said that "he was rich in the affection of all who knew him." [1]

Plainly, the public, and apparently the courts, were then far from considering individual control of interstate transportation to be a ground for governmental or judicial interference.

The policy which thus built up "the immense mail stage establishments," as they were then considered,[2] was not accidental, nor was it a temporary expedient. Canals and railways were built and maintained in the same way, and the policy which began in the East extended throughout the country and continued unquestioned until after the Civil War, — in some respects still continues.

[1] *Cleveland Herald*, Feb. 27, 1824. Article on Levi Pease, *New England Genealogical and Historical Register*, Vol. 2, p. 313. Mss. entitled "A Traveller's Journal, Observations, and Reflections in the Western, Middle and Eastern States of North America, A.D. 1823–4," published in the *National Crisis* and copied in the *Western Reserve Chronicle* of Warren, Trumbull County, Ohio, Feb. 2, 1824.

[2] *Cleveland Herald*, Feb. 27, 1824.

An idea of the extent to which monopolies were granted may be gained from an examination of early statutes.

In New York a monopoly of stage transportation on the east bank of the Hudson was in 1785 given to an individual.[1] Transportation in the Mohawk Valley seems to have taken care of itself, but in 1804 the need for better facilities west of Utica is shown by the grant of a monopoly of stage transportation from Utica to Canandaigua,[2] and in 1807 a monopoly was granted from Canandaigua to Buffalo.[3] Thus, except the distance from Albany to Utica, the whole path now followed by the New York Central Railroad from one end of the State to the other, was given by law to private monopoly. That these monopolies did not expressly operate beyond the State line is of small moment. They extended to the State line, and restricted interstate transportation to the channels which the State established for its passage.

This is true also of the monopoly which the State granted in 1798 for transportation between Lansingburgh and Hampton in Washington County, near the Vermont line, west of Rutland;[4] of the monopoly granted in 1803 for transportation between Albany and a point on the New Jersey line;[5] of the monopoly of 1811 between Schaghticoke and the Vermont line, in Washington County;[6] and of the monopoly between

[1] Laws of 1785–1788, Ch. 52, p. 99, Act of April 4, 1785.
[2] Laws of 1805, Ch. 69, p. 137, Act of April 2.
[3] Act of April 6, 1807, Ch. 144, p. 186.
[4] Act of March 30, 1798, Ch. 62, p. 224.
[5] Act of Feb. 26, 1803, Ch. 20, p. 322.
[6] Act of April 4, 1811, Ch. 151, p. 226.

Champlain, in Clinton County, and the Canada line.[1] The monopoly of transportation between Catskill Landing and Unadilla, which was granted in 1805[2] and renewed in 1812,[3] did not extend to the State line, and may in fact have had little to do with interstate transportation; but, as a matter of law, interstate traffic passing between these points, if any such existed, was as effectually restricted as was the purely domestic traffic.

In some instances the grant of exclusive privileges was expressly made effective beyond the State line.

On March 30, 1797, the State of New York granted to an individual the exclusive right to operate between Goshen, Orange County, and New York City. The natural course of this coach would be through the Ramapo Valley, past Tuxedo, and through a portion of New Jersey. The statute does not specify the route to be followed, but it excludes all competition between the two points named, and, therefore, covers all routes.[4] The same may be said of the monopoly granted in 1817 of transportation between Newburgh, Monticello, and other places, "on the mail route, so far as the same lies within this State"[5] — apparently a rather circuitous route. What had been done in New York was also done in other States. Transportation between New York and New England was monopolized in Connecticut by that State.[6] The mail route through Vermont, between

[1] Act of April 5, 1817, Ch. 183, p. 181.
[2] Act of March 28, 1805, Ch. 49, p. 70.
[3] Act of June 8, 1812, Ch. 108, p. 183.
[4] Laws of 1797–1800, Ch. 70, p. 97.
[5] Act of Feb. 14, 1817, Ch. 35, p. 24.
[6] Perrin *v.* Sikes (Conn., 1802), 1 Day 19.

Springfield, Massachusetts, and Dartmouth College, New Hampshire, was given by Vermont as a monopoly to Levi Pease.[1] In the same manner the North and South lines of communication in the South were monopolized by Maryland[2] and Virginia.[3] South Carolina in 1796 established a monopoly of stage transportation between Georgetown and Charleston, and Charleston and Savannah, Georgia, reserving, however, a right to the Federal government to run stages between the places named.[4]

In the matter of exclusive grants of ferries and bridges the States were especially liberal.

Before the decision of Gibbons *v.* Ogden and after the adoption of the Constitution, the State of Vermont granted no less than twenty-eight exclusive rights of ferriage over Lake Champlain to the New York shore, besides twenty-seven grants of exclusive rights of ferriage over waters of Lake Champlain within the limits of the State. Within the same period New York granted fourteen monopolies of ferriage over Lake Champlain to the Vermont shore, besides granting two monopolies of ferriage across the St. Lawrence River to the Canada shore, and one across the Delaware River to the Pennsylvania shore.

This practice still continues with the express approval of the Supreme Court and the courts of many States.[5]

[1] Act of Oct. 31, 1792. [2] Act of Dec. 21, 1790.

[3] Act of Dec. 4, 1787, Ch. 79, p. 618; Act of Oct. 31, 1792, Ch. 98, p. 622; Act of Dec. 21, 1790, Ch. 62, p. 194.

[4] Act of Dec. 19, 1796, Vol. V, Stats. S. C., p. 281; see also — Act of Dec. 17, 1808, Vol. V, Stats. S. C., p. 580; Act of Dec. 16, 1815, Vol. IX, Stats. S. C., p. 482.

[5] Prentice and Egan, Commerce Clause, p. 157.

Many other statutes of this character may be cited, all at the time of undoubted validity.

The question of the constitutionality of such laws was brought before Congress in 1792 upon a motion to allow the proprietors of stages employed in carrying the mails to carry passengers also. This, it was answered, was not within the power of Congress. "The question," said Mr. Niles, "is simply, whether Congress have a right to authorize the carrier of the mail to carry passengers, on hire through those States where an exclusive right of carrying passengers, has been granted by the State government and still exists. You are empowered by the Constitution to establish post-offices and post-roads, and to do whatever may be necessary and proper to carry that power into effect. Now, sir, is it necessary, in order to the transportation of your mail, that you should erect stage-coaches for the purpose of transporting passengers? What has your mail to do with passengers transported for hire? Why, sir, nothing more than this — by granting to the carrier of your mail a right to carry passengers for hire, the carriage of the mail may be a little less expensive. Does this consideration render it necessary and proper for you to violate the laws of the States?" [1]

The motion was lost. No suggestion was made that the State laws in any way concerned the Federal power over commerce, or that their validity was open to question on this ground.

Even in relation to foreign commerce the Federal power did not go unchallenged, for during the period in

[1] Annals 2d Congress (1792), pp. 303–309.

which Congress was prevented from prohibiting the slave trade many States prohibited the importation of slaves,[1] — a course of action in which the Federal government apparently acquiesced. The House of Representatives, at least, then claimed nothing more than that it could regulate the treatment of slaves by citizens of the United States during their transportation into the States admitting them.[2] It is true that "the migration or importation of such persons as any of the States now existing may think proper to admit" is the subject of a separate provision of the Constitution, but the very form of this provision implies that until legislation by Congress the States were free to act. This was the general view.[3] It was said in Congress without contradiction that "the State governments have always possessed the power of stopping or taxing passengers; that power they have never given up," [4] and even a broader power was exercised, for after the adoption of the Constitution acts of banishment appear to have existed and were repealed some time later.[5]

[1] Schouler's "History of the United States," Vol. I, p. 144.

[2] Annals of Congress, Feb. 11, March 23, 1790; Act of Feb. 28, 1803; 2 Stat. 205; Annals 7th Cong., 2d Sess., 1563. Brig Wilson *v.* United States, 1 Brock., 423.

[3] Groves *v.* Slaughter, 15 Pet. 449; Maryland, Act of Jan. 4, 1812, Ch. 179, p. 176, Laws of 1811–1812; Act of Jan. 8, 1816, Ch. 56; Laws of 1816–1817; South Carolina, Act of Dec. 19, 1796.

[4] Annals 2d Congress (1792), 303, 309.

[5] New York, Act of April 3, 1790, Ch. 46, p. 175; Georgia, Act of Feb. 7, 1799. Transportation out of the State as a punishment for crime was forbidden by Illinois Constitution of 1818, Art. VIII, Sec. 17; Arkansas Constitution of 1836, Art. I, Sec. 10; Ohio Constitution of 1802, Art. VIII, Sec. 17; Vermont Constitution of 1793, Chap. I, XXI. Mississippi forbade the exile of any free white citizen of the State, Constitution of 1832, Art. I, Sec. 27. Transportation from the United States was, in Virginia, long a recognized punishment for slaves. Code 1860, Ch. 17, Sec. 19, Ch. 200. In many instances State Constitutions guaranteed the right of emigration. Indiana Constitution of 1816, Art. I, Sec. 23; 1851, Art. I, Sec. 36; Kansas

Gibbons *v.* Ogden held that a monopoly granted by the State of New York of the navigation of its waters could not exclude competition in the business of transporting passengers and freight through the Kill-von-Kull and over the Hudson River between Elizabethtown, New Jersey, and the City of New York.

In view of the practice which had continued unquestioned for thirty-five years, the decision seems, upon first reading, a revolutionary usurpation of power by the Supreme Court. If a State may grant monopolies of ferriage, why not also of other navigation? It is not the distance travelled after crossing the line which raises the question of Federal power, but the fact of the crossing.[1] If the right of transportation across Lake Champlain can be granted as a monopoly, why not also the right of transportation across the Hudson? If a State may grant monopolies of transportation by land, why not by water?

How then was the decision in Gibbons *v.* Ogden received at the time? To what extent was it applied? Was it considered to cast doubt upon the validity of long-continued practice?

A very brief examination of current writings shows that, so far from being revolutionary, the doctrine of

Constitution of 1857, Art. XV, Sec. 22; Kentucky Constitution of 1792, Art. XII; 1799, Art. X, Sec. 27; 1850, Art. XIII, Sec. 29; Missouri Constitution of 1820, Art. XIII, Sec. 21; Oregon Constitution of 1857, Art. I, Sec. 31; Pennsylvania Constitution of 1776, XV; 1790, Art. IX, Sec. 25; 1838, Art. IX, Sec. 25; 1873, Art. I, Sec. 25; Vermont Constitution of 1777, Ch. I, XVII; 1786, Ch. I, XXI; 1793, Ch. I, XIX.

[1] Covington Bridge Co. *v.* Kentucky, 154 U. S. 204; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196.

the Court was in accord with the best public opinion of the time.[1]

The case was argued on Wednesday, Thursday, Friday, and Saturday, Feb. 4, 5, 6, and 7, 1824. The decision was announced on Tuesday, March 2, 1824. On Friday, March 5, the New York *Evening Post* reported the fact, saying: —

"This opinion, drawn up by Justice Marshall, presents one of the most powerful efforts of the human mind that has ever been displayed from the bench of any court. Many passages indicated a profoundness and forecast, in relation to the destinies of our Confederacy, peculiar to the great man who acted as the organ of the court. The Steamboat Grant is at an end."[2]

The opinion was published by the *Evening Post* on Monday, March 8, with the remark: "We presume it will command the assent of every impartial mind competent to embrace such a subject." On March 27, the Louisville *Public Advertiser* expressed the same view: "We not only believe the opinion of the court to be correct; but we feel confident that, had the same case been tried by any competent tribunal, not within the State of New York, the result would have been the same."

There was nothing new in the establishment of the rule which to most modern readers seems the great achievement of the case, that Federal power over com-

[1] Veto message of Gov. Oliver Wolcott of Connecticut, May Session, 1822, reported in *Columbian Register* (New Haven), June 1, 1822. See also New York *National Union*, March 13, 1824; Connecticut *Courant*, March 9, 1824; *Columbian Register*, April 3, 1824; New York *American*, March 5, 1824; *Delaware Gazette* (Wilmington), March 19, 1824.

[2] To same effect, Albany *Argus*, March 9, 1824.

merce is exclusive. To the extent then under consideration, it had always been so regarded.[1] State navigation laws were not repealed by the States which had enacted them, but were treated as ineffective, — unconstitutional. In one instance, indeed, an agreement made by two States, for free passage of goods from one to the other by water was, in the absence of any legislation by Congress, repealed by one of the States, apparently upon the ground that under the Constitution this result was accomplished without legislation.[2] It is true that the States continued to enforce their own pilotage and quarantine laws, but this was expressly permitted by Federal statutes. Daniel Sheffey, of Virginia, in his argument in the House of Representatives in February, 1817,[3] assumed that the Federal power over commerce was exclusive, and even Philip P. Barbour, then a member from the same State, although he disagreed with Sheffey's conclusions, raised no question of the correctness of this assumption. William Crawford of Pennsylvania said in 1811 that "The sole power given to the United States, to . . . regulate commerce, or make war, has never been questioned." [4]

That the Federal power was exclusive seems, however, as the subject was then regarded, to have had little relation to monopolies of transportation, and no relation whatever to land transportation and ferriage. The New York Steamboat grant and the case of Gib-

[1] Elliot Deb. Vol. IV, p. 20.
[2] Act of North Carolina, Nov. 25, 1790, Laws of 1715–1795, Ch. 377.
[3] Annals 14th Cong., 2d Sess., pl. 888.
[4] Speech in House, Jan. 23, 1811. Annals 11th Cong., 3d Sess., 753.

bons *v.* Ogden were the subjects of widespread public interest and of many leading articles and letters, but in the whole discussion no reference was made to an effect upon other monopolies than the one involved in this case. Had it been thought possible that the decision might affect monopolies of land transportation and ferriage, some, of all those then writing on the subject, must have referred to a result which, if a possible consequence, was an obvious one.

To learn the meaning of the decision we are thrown back upon the case itself in connection with the facts of contemporary history.

Gibbons *v.* Ogden involved the validity of a law of the State of New York, giving to Livingston, Fulton, and their assigns the exclusive right for a term of years to navigate the waters of that State by steamboats. This exclusive right, over part of these waters, had been assigned to Ogden. Gibbons was the owner of a vessel of more than twenty tons burden, enrolled and licensed under Federal law, for carrying on the coasting trade, between Elizabethtown in New Jersey and the City of New York, the part of the voyage within the State of New York being over waters covered, if the State law were valid, by Ogden's monopoly.

To protect this monopoly Ogden filed his bill against Gibbons in the New York State court, praying for an injunction to forbid the operation of the defendant's vessel within the closed waters of the State. This injunction being granted, and the decree affirmed by the highest court of the State, the case was brought before the Supreme Court of the United States for review.

The issues presented were recognized at the time as momentous. Over them, the States of New York, New Jersey, and Connecticut were, said Attorney-General Wirt, "almost on the eve of war." Unless the dispute can be settled, he said, "you will have civil war." [1]

For the plaintiff in error, who had been defendant below, but one defence was presented in the pleadings. He relied on licenses granted under the Act of Congress of Feb. 18, 1793, for enrolling and licensing ships and vessels to be employed in the coasting trade. This was his sole defence, although in argument it was also urged that the Federal power over commerce was exclusive of all State jurisdiction.

For defendant in error it was contended that the Federal statute did not grant authority to engage in the coasting trade, but like other licensing acts merely imposed restrictions upon the conduct of the trade, and furthermore that State and Federal powers over the subject were concurrent.

[1] 9 Wheat. 1, 184–192. The newspapers of the time show much irritation in all these States, but there is little to indicate the existence of such serious apprehensions as those stated by the Attorney-General. Still the situation was undoubtedly difficult, and some radical counsels may be found.

"We can hardly believe it possible, that small as the State of New Jersey is, it will suffer itself to be degraded, and its rights to be trampled upon, without a struggle, at least, to maintain them. We hope and trust that the act laying a tax on steamboat passengers, passed the last winter, will be promptly and rigidly enforced, and that the legislature of New Jersey will, at their next session, adopt such other decisive measures as the interest, honour, and dignity of the State require." Trenton, *True American*, Jan. 24, 1820. See also, New Brunswick *Fredonian*, April 11, 1822. Irritation over the New York monopoly seems to have been strong also in Ohio and in Vermont, for Ohio imposed upon all vessels which, claiming the right to navigate the waters of New York under the laws of that State, landed passengers in Ohio, a fine of $100 for each passenger so landed, — *Republican Advocate* (New London, Conn.), May 1, 1822, while Vermont granted to an individual a monopoly within its limits of the right to navigate the waters of Lake Champlain, — Act of Nov. 10, 1815, Ch. 102, p. 120.

In considering these propositions it is important to observe closely the position taken by counsel for the appellant. Mr. Webster contended:—

"That the power of Congress to regulate commerce, was complete and entire, and, to a certain extent, necessarily exclusive; that the acts in question were regulations of commerce, in a most important particular; and affecting it in those respects, in which it was under the exclusive authority of Congress. He stated this first proposition guardedly. He did not mean to say that *all* regulations which might, in their operation, affect commerce, were exclusively in the power of Congress; but that *such power* as had been exercised in this case, did not remain with the States. Nothing was more complex than commerce; and in such an age as this, no words embrace a wider field than *commercial regulation*. Almost all the business and intercourse of life may be connected, incidentally, more or less, with *commercial regulation*. But it was only necessary to apply to this part of the Constitution the well settled rules of construction.

"Some powers are holden to be exclusive in Congress, from the use of exclusive words in the grant; others, from the prohibitions on the States to exercise similar powers; and others, again, from the nature of the powers themselves. It has been by this mode of reasoning that the Court has adjudicated on many important questions; and the same mode is proper here. And, as some powers have been holden exclusive, and others not so, under the same form of expression, from the nature of the different powers respectively; so, where the power, on any one subject, is given in general words, like the power to regulate commerce, the true method of construction would be, to consider of what parts the grant is composed, and which of those, from the nature of the thing, ought to be considered exclusive. The right set up in this case, under the laws of New York, is a *monopoly*. Now, he thought it very reasonable to say, that the Constitution never intended to leave with the States the power of granting monopolies, either of trade or of navigation; and,

therefore, that as to this, the commercial power was exclusive in Congress." [1]

It would be difficult to find more convincing evidence of Webster's genius than the fact that in the first argument upon the commerce clause in the Supreme Court, he suggested the distinction which is now embedded in the Constitution itself. To students who have known no other construction, the distinction seems inevitable, but it was not so at the time.

Even the Chief Justice in his decision of the case gave Webster's distinction no support. The doctrine of the Court, if accepted literally, is surprising in the extent of the power claimed for the Federal government. Commerce was defined as a term of the largest import, including intercourse for the purpose of trade in any and all its forms. Throughout this wide field there was to be but one sovereign. The power of commercial regulation, it was held, is a whole, incapable of division, and, therefore, exclusive of a like power in a co-ordinate sovereignty. "The power to tax," Mr. Chief Justice Marshall said, "is an instance of a power which is in its nature divisible."

"Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. . . . When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the

[1] 9 Wheat. 9–10.

several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce. . . . It has been contended by the counsel for the appellant, that as the word to 'regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted." [1]

In this opinion, Mr. Justice Johnson agreed, holding

"The power of a sovereign State over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon." [2]

On these grounds the Court announced the broad rule that the power of commercial regulation is an indivisible unit; that it is exclusively vested in Congress, and that no part of it can be exercised by a State.

At this point the limitation upon Webster's conclusion and upon the doctrine of the Court becomes conspicuous. The framers of the Constitution, Webster says,

[1] 9 Wheat. pp. 199, 209. [2] p. 227.

"never intended to leave with the States the power of granting monopolies, either of trade or of navigation." Why this restriction of Federal power to navigation? Is not all interstate transportation within Federal control, and is not navigation within the control merely as one of many methods of transportation?

This doctrine — now, in some aspects, the commonplace of constitutional law — was wholly impossible in 1824. To have held that all monopolies granted by the States were illegal, would have overturned established customs and rights of property until then unquestioned. No such effect was intended and no new doctrine was advanced. The Chief Justice spoke of his opinion as having "the tediousness inseparable from the endeavor to prove that which is already clear." [1] Mr. Justice Johnson said that the doctrine of the case had long been approved by "contemporaneous and continued assent." [2] As stated by the Court, the decision, in this respect, followed Webster's argument, and, without reference to transportation, held that the Federal power over commerce included control of navigation.[3] To this point the decree is expressly limited.[4] No reference was there made to an exclusive Federal power to regulate intercourse. The recitals of the decree stated merely that the Court was of opinion that the licenses set up by the appellant were valid, and gave full authority to navigate the waters of the United States for the purpose of carrying on the coasting trade, any State law to the contrary notwithstanding.

So far as concerns the actual ruling, the record is,

[1] p. 221. [2] p. 229. [3] p. 190. [4] p. 239.

therefore, substantially free from doubt. The decree establishes that navigation is within the commercial powers of Congress, and that a Federal coasting license is a sufficient authority to navigate the public waters of a State.[1]

It has been common, however, to assume that the decision went far beyond a determination of this narrow issue. It is said that the language of the opinion is unambiguous, — why then should not its words be literally accepted and applied in their natural meaning?

The answer to this question is not far to seek. The natural meaning of the words is not now what it was when the opinion was written. Within a few years after this decision the whole economic situation was changed by the introduction of railroads. Marshall could in 1824 safely frame his definition of commerce in the broadest terms, because commerce itself was a narrow operation. When easier means of intercourse brought the States closer together, even judges who sat on the bench with Marshall differed under the new conditions, as to the meaning of the language in this case.[2]

One thing, however, is clear — the Federal power does not even yet cover all intercourse for purposes of trade, nor are the States wholly excluded from power to legislate upon the subject. Indeed, there never was a time when the doctrine of Gibbons *v.* Ogden — if the

[1] Opinion of Mr. Justice Catron in License Cases (U. S., 1847), 5 How. 603. Opinion of Mr. Chief Justice Taney in Wheeling Bridge Case (U. S., 1851), 13 How. 585. Opinion of Justices Clifford, Wayne and Davis in Gilman *v.* Philadelphia (U. S., 1865), 3 Wall. 739.

"What is the Test of a Regulation of Foreign or Interstate Commerce?" by Mr. Louis M. Greeley, 1 *Harvard Law Review*, 159.

[2] 5 How. 604.

words of the opinion be literally accepted in their modern sense, — could be generally applied to actual conditions of foreign and interstate commerce, while as to commerce with the Indian tribes an entirely different rule prevailed.[1]

The decision must be read in its relation to the history of the times and the facts of the case. "No judge, in vindicating the judgment of the court, can deliver maxims of universal application in every sentence, or oracles which may be read in two ways, one applicable to the case before him, the other not. To sever the arguments of a judge from the facts of the case to which he refers will often lead to very erroneous conclusions." [2]

What, then, was "commercial intercourse" among the States as Marshall knew it? What was the intention of the framers of the Constitution in regard to this intercourse? What were the constitutional doctrines which in 1824 had long been approved by "contemporaneous and continued assent"?

Commerce in 1824 was conducted on land by horse and wagon or afoot; it was conducted on the water by navigation. Land communication at that time had no direct relation to the Federal government. Then, as now, one might walk or drive through any State without becoming conscious of Federal regulation.

With navigation conditions were different.

[1] Speech of Storrs in House of Representatives, May 15, 1830. Cong. Deb., Vol. VI, Part II, p. 1003; Act of N. Y., April 10, 1813, 2 R. L., 1813, Ch. 92, p. 153; Act of April 12, 1822, Laws of 1822, Ch. CCV, p. 202; April 5, 1817, Laws of 1816–1817, Ch. CXLII, p. 149; Speech of Senator Adams, April 20, 1830, Cong. Deb., Vol. VI, Part I, p. 360. House Report No. 227, 21st Cong., 1st Sess.

[2] Mr. Justice Grier in the Passaic Bridges, 3 Wall. 782, 791.

"Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. . . . Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the National legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land. This, when the Constitution was adopted, was entirely performed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair, and management, to State regulation and control. . . . No one then supposed that the wagons of the country, which were the vehicles of this commerce, or the horses by which they were drawn, were subject to national regulation." [1]

The decision in Gibbons *v.* Ogden then related solely to transportation by water; it held that navigation was within Federal control.

The intention of the framers of the Constitution in regard to this intercourse appears from the history of the Convention, and from public discussions of the period.

By the accepted rule of construction, Federal powers are exclusive of State jurisdiction in three cases only — first, when the Constitution expressly so provides; sec-

[1] Railroad Company *v.* Maryland, 21 Wall. 456, 470. Pullman's Car Company *v.* Twombly, 29 Fed. 658, 666.

ond, when the grant of power to the Union is accompanied by express prohibitions to the States; third, when the Constitution "granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant." [1]

The grant of power to Congress over commerce was not in terms exclusive.

The Constitution contains moreover many other grants of commercial power to the government, such as the power to coin money, to establish uniform laws of bankruptcy, to grant patents and copyrights, to regulate weights and measures, etc. These powers were not in express terms made exclusive and they were not exclusive. In Maryland, for example, the Federal currency was established by the Act of December 21, 1812, "recognizing the coin of the United States." In Massachusetts this was done by Act of February 25, 1795, "introducing the dollar and its parts," and other statutes of this sort may be found.[2] The Federal power over bankruptcy was never considered exclusive.[3] Patents were granted by a number of States.[4] That the copyright granted by New Hampshire in the Act of Nov. 7, 1783, was considered in force after the adoption of the Constitution is indicated by the fact

[1] Hamilton in *Federalist*, No. 32.

[2] New York, Act of Feb. 26, 1789, Ch. 33, p. 71; Vermont, Act of Oct. 19, 1809, Laws of 1796–1820, Ch. 775.

[3] Sturges *v.* Crowninshield, 4 Wheat. 122.

[4] New York, Act of Jan. 27, 1797, Ch. 9, p. 9; North Carolina, Act of 1801; Massachusetts, Act of June 15, 1793; Maryland, Act of Jan. 22, 1785. The patent law of 1793 provided that before an applicant could receive a Federal patent he must surrender all rights derived from the States. 1 U. S. Stat., p. 322, Sec. 6.

that the statute is included in the laws of 1815,[1] a book "published by authority" and containing "all the general and publick statutes now in force."

In place of this limitation the States were, therefore, left free to legislate, except so far as their power was restricted by express prohibitions of the Constitution or was incompatible with the power given to the Union.

Over the express prohibitions of the Constitution little doubt has arisen. The States are forbidden to tax imports or exports; to lay duties on tonnage; to impose inspection charges for purposes of revenue; to coin money; to impair the obligation of contracts, etc. To this extent at least they could not interfere with Federal authority.

The great controversy which existed from the time the litigation arose which was terminated in Gibbons *v.* Ogden until the decision of Cooley *v.* Port Wardens[2] in 1851, was whether the State power of commercial regulation was in any way restricted by the grant of a similar power to Congress. Was the authority given to the Union "absolutely and totally repugnant" to similar authority in the States?

Hamilton's illustration of such repugnancy is in the Federal power "to establish an uniform rule of naturalization throughout the United States." Of this provision he says that it "must necessarily be exclusive: because if each State had power to prescribe a distinct rule, there could be no uniform rule."[3] Attorney-Gen-

[1] Laws of New Hampshire, 1815, p. 365. See dissenting opinion of Mr. Justice Thompson in Wheaton *v.* Peters, 8 Pet. 591, 658.
[2] 12 How. 299.
[3] *Federalist*, No. 32.

eral Wirt based his argument in Gibbons *v.* Ogden upon this method of construction, saying that "regulation of that commerce which pervades the Union, necessarily implies *uniformity*, and the same result, therefore, follows as if the word had been inserted" in the grant of power to Congress.[1]

Now, it is not difficult to ascertain in what respect the framers of the Constitution contemplated uniformity of commercial regulation. The subject met with the widest public discussion, and the Constitutional Convention itself was brought about by the recognized necessity of such a system. Madison's resolution in the Virginia House of Delegates and the report of the Annapolis Commissioners urged uniformity of regulation, and in the debates thus aroused the nature of the commercial powers contemplated is well defined. From these sources it appears that under a form of expression sufficiently broad to give Congress power within certain limits, to prevent conflicting and discriminating State legislation, the Convention had prominently in mind the establishment of a Federal authority competent to regulate foreign relations; to control navigation; to raise a Federal revenue by means of a tariff, and to prevent the imposition of duties by particular States upon articles imported from or through other States. To this extent the Federal power of commercial regulation was undoubtedly a unit incapable of division. This was what Madison meant when he used this phrase in the Constitutional Convention,[2] and it was to regulations

[1] p. 178.
[2] Elliot Deb., Vol. V, p. 548; Smith *v.* Turner, 7 How. 396.

of this character that Monroe referred in 1822 when he said that:—

"Commerce between independent powers or communities is universally regulated by duties and imposts. It was so regulated by the States before the adoption of this Constitution, equally in respect to each other and to foreign powers. The goods and vessels employed in the trade are the only subjects of regulation. It can act on none other." [1]

When the Court in 1824 held that the Federal power over commerce is indivisible, it referred to operations of commerce which had always been considered within this rule. To this doctrine, and to no other, had there been contemporaneous and long-continued assent. At the very time, however, that the rule was announced, a distinction was made, as has been shown, between transportation and navigation, — Marshall's broad definition of commerce did not include transportation in its relation to the carrier. This is not, and at that time had never been considered as, a part of commerce.

"Commerce has a definite signification. It means the ordinary buying and selling, and bartering, between the citizens of the same country, and the citizens of one country with the citizens of another country, and it means no more. Universal usage has fixed its boundaries so permanently, they cannot be shaken by any artificial or sophistical argument." [2]

"Trade and commerce actually consist in buying and selling, though they may perhaps be also said to include certain necessary

[1] Message to Congress, May 4, 1822. See also speech of William H. Crawford in Senate, Feb. 11, 1811. Annals 11th Cong., 3d Sess., pl. 139.

[2] Speech of William Smith, Senator from North Carolina, April 11, 1828, Cong. Deb., Vol. IV, Part I, pl. 647. Senator Stanford, April 26, 1886, Vol. 17, Cong. Rec., Part IV, p. 3287.

incidents of buying and selling, as for example, the carriage of goods bought and sold from the seller to the buyer. . . . It is only, however, in its relation to the buyer and seller of goods that the carriage of such goods can be said to be an incident to the buying and selling of them." [1]

The Supreme Court has apparently held this view in its decisions that the right of shipper and traveller to send goods, or to go, from one State to another, originates not only in State law, but is a right which every citizen is entitled to exercise under the Constitution,[2] while the duty, and, therefore, the right of the carrier to transport goods by land from State to State before the adoption of the Interstate Commerce Act, originated in State law alone.[3]

In regard to navigation other considerations controlled. John Randolph said that the proximate as well as the remote cause of the existence of the Federal government, was the necessity of a single authority which could regulate foreign commerce.[4] It was necessary, too, that the Federal government be given authority to raise a revenue, and the accomplishment of either of these objects compelled the grant of authority to that government to regulate navigation, both foreign and coastwise. All this appears over and over again in the

[1] "The Northern Securities Case," by Prof. C. C. Langdell, 16 *Harvard Law Review*, 539, 544. See also decision of Judge Peter S. Grosscup, in United States *v.* Swift & Co. (1903), 122 Fed. 529, 531, 532.

[2] Crandall *v.* Nevada (U. S., 1867), 6 Wall. 35; Case of the State Freight Tax, 15 Wall. 232; see Crutcher *v.* Kentucky (1890), 141 U. S. 47.

[3] Bowman *v.* Chicago, &c., Ry. Co. (1885), 115 U. S. 611, 615.

[4] Speech in House of Representatives Jan. 3, 1824. Annals 18th Cong., Vol. I, 1299. "It is obvious to even the most superficial observer that the commerce of the United States with foreign countries ought to be regulated and protected by proper treaties to be negotiated. No separate State can treat." *American Museum*, January, 1787.

writings of that period. Madison in the introduction to his report of the debates of the Constitutional Convention says: —

"The want of authority in Congress to regulate commerce has produced in foreign nations, particularly Great Britain, a monopolizing policy, injurious to the trade of the United States, and destructive to their navigation; the imbecility and anticipated dissolution of the Confederacy extinguishing all apprehensions of a countervailing policy on the part of the United States. The same want of a general power over commerce led to an exercise of the power, separately, by the States, which not only proved abortive, but engendered rival, conflicting, and angry regulations. Besides the vain attempts to supply their respective treasuries by imposts, which turned their commerce into the neighbouring ports, and to coerce a relaxation of the British monopoly of the West India navigation, which was attempted by Virginia, the States having ports for foreign commerce taxed and irritated the adjoining States trading through them, as New York, Pennsylvania, Virginia, and South Carolina. Some of the States, as Connecticut, taxed imports from others, as from Massachusetts which complained in a letter to the executive of Virginia, and doubtless to those of other States. In sundry instances, as of New York, New Jersey, and Maryland, the navigation laws treated the citizens of other States as aliens." [1]

The only way in which the hostile legislation of other countries could be met would be by a power which could prohibit access to all the States alike or grant it to all, as circumstances might require.[2] In the language of Adams,[3] "if monopolies and exclusions are the only arms against monopolies and exclusions" the venture

[1] Madison Papers, Elliot Deb., Vol. 5, p. 119.
[2] Curtis, "Constitutional History," Vol. I, p. 186 (2d ed.).
[3] Letter to Jefferson, Aug. 7, 1785; Letter to Jay, June 26, 1785. Works, Vol. VIII, pp. 291, 273.

should be made. "It was a miserable policy to be forced to adopt," says Mr. Fiske, "for such restrictions upon trade inevitably cut both ways," but no other course was open.[1]

The difference in the nature of Federal control over the two branches of commerce was, therefore, that foreign commerce was to be controlled not alone for the protection of buyer and seller, but navigation itself was to be regulated. It was intended furthermore, that, so far as concerned foreign commerce and navigation, Congress should have the right to determine who could engage in these operations, — in other words, that in this field and for international purposes, Congress could establish monopolies and exclusions.

Communication between the different ports of every nation is entirely within the power of that nation.

"The policy of most countries has been to secure this domestic navigation to their own people. The extensive coasts, the immense bays and numerous rivers of the United States have already made this an important object, and it must increase with our population. As the places at which the cargoes of coasting vessels are delivered must be supplied with American produce from some port of the Union, and as the merchant can always have American bottoms to transport the goods of the producing State to the State consuming them, no interruption to the market of the planters and farmers can be apprehended from prohibiting transportation in foreign bottoms from port to port within the United States."[2]

[1] Fiske, "Critical Period," p. 146 (ed. 1897). See also "Inquiry into the Principles on which a Commercial System for the United States should be Founded." Read before the Society for Political Inquiries at the House of Benjamin Franklin, Philadelphia, May 11, 1787. Published anonymously but credited to Tench Coxe.

[2] "An Inquiry into the Principles on which a Commercial System for the United States should be Founded," *supra*.

The policy sometimes advocated [1] in regard to interstate commerce as a means of trust regulation was in fact intended by the framers of the Constitution as a means of regulating international relations, — but for international purposes only. In other relations the right of navigation does not come from the Federal government,[2] and no Federal franchise is needed for its exercise.[3]

Among Americans no distinctions could be made and no exclusive rights granted by Congress. "The wise policy of our Constitution admits of no such monopolies." [4] "Monopolies, perpetuities, and class legislation are contrary to the genius of free government, and ought not to be allowed. Here there is no room for favored classes or monopolies; the principle of our government is that of equal laws and freedom of industry." [5]

The "miserable policy" which, as Mr. Fiske says, Congress was "forced to adopt" in relation to foreign nations, was, therefore, never considered possible in relation to the different States. The speech which John Randolph made in the House of Representatives on January 30, 1824, treats of the difference in this respect between the powers of Congress over foreign and interstate commerce.

[1] Speech of Attorney-General Knox at Pittsburg, Oct. 14, 1902, 36 Cong. Rec., p. 413; First Annual Report of U. S. Commissioner of Corporations, Dec. 21, 1904. Platform of Democratic Party, 1904.

[2] Gibbons *v.* Ogden, 9 Wheat. 1, 211, 227.

[3] Railroad Company *v.* Maryland, 21 Wall. 456, 470.

[4] "Thoughts on the Commerce of the United States," by John Swanwick, *American Museum*, August, 1792.

Answer to Mason's objections by James Iredell; Ford, "Pamphlets on the Constitution," 357.

[5] First annual message of President Johnson, — the production of George Bancroft: see *American Historical Review*, Vol. 11, p. 547, *ibid.* 951.

"If, indeed," Mr. Randolph said, "we have the power which is contended for by gentlemen under that clause of the Constitution which relates to the regulation of commerce among the several States, we may, under the same power, prohibit, altogether, the commerce between the States, or any portion of the States, or we may declare that it shall be carried on only in a particular way, by a particular road, or through a particular canal; or we may say to the people of a particular district, you shall only carry your produce to market through our canals, or over our roads, and then, by tolls imposed upon them, we may acquire power to extend the same blessings and privileges to other districts of the country. . . . Sir, there is no end to the purposes that may be effected under such constructions of power. . . . If we," in Virginia, "should chance to encounter the displeasure of the Government, under these constructions of power, they may say to every wagoner in North Carolina, you shall not carry on any commerce across the Virginia line, in wagons or carts, because I have some other object to answer, by a suppression of that trade. Are gentlemen prepared for this?" [1]

To the question there could then be but one answer. No one at that time claimed for the Federal government the broad powers over commerce among the States which it possessed over foreign commerce and navigation. It is a very modern view of the Constitution that Congress cannot only prescribe the manner in which interstate commerce may be conducted, but it may determine the qualifications which those must possess who would engage therein; that is, that Congress may confine the right to a favored class, be the class large or small. This we may be entirely sure was not the intention of the framers of the Constitution.[2] "In one of its most im-

[1] Annals 18th Cong., 1st Sess., Vol. I, pl. 1307; see speech of Mr. Fitzsimmons in House of Representatives, Jan. 3, 1792.

[2] See, for example, article "On Monopolies," *American Museum*, September, 1792.

portant aspects, the Revolution was a deadly blow aimed at the old system of trade restrictions. It was to a certain extent a step in realization of the noble doctrines of Adam Smith," [1]

The Federal government not only was without power to establish monopolies of interstate transportation, but it could not even interfere with the monopolies of such transportation which were established by the States. Local self-government was the theory of the Constitution. If State monopolies were wrong, it was by the States that they should be abolished. The motion which was made in the Second Congress to permit proprietors of stages employed in carrying the mails, to carry passengers also, was lost as being beyond the power of Congress.[2]

Gibbons *v.* Ogden destroyed State monopolies of coasting navigation, but had no effect on State monopolies of interstate transportation by land, or by water when not conducted coastwise. The purpose of the Constitution was to establish "an unrestrained intercourse between the States" [3] "on the basis of equal privileges." [4] State tariffs and the conflicting and discriminating State legislation which interfered with free trade in the goods of the several States were, therefore, to be abolished, but, so far as concerned transportation among the States viewed from the standpoint of the carrier, the Federal power extended no further than the

[1] Fiske, "Critical Period," p. 140; see "Causes of the American Revolution," by Professor James A. Woodburn, Johns Hopkins University "Studies in Historical and Political Science," Vol. X, p. 22; Franklin, "Causes of American Discontent," Works (Putnam), Vol. IV, p. 97.

[2] Annals 2d Cong., 1792, pp. 303–309.

[3] *Federalist*, No. 11 (Ford, p. 69). [4] *Federalist*, No. 7 (Ford, p. 37).

control of that part of it included in navigation — in other words to the coasting trade. This was involved in the regulation of foreign commerce,[1] but there were other good reasons for giving it into national control.

"Owing to the extent of our coast, danger exists, that, in conducting this trade, the revenue will be defrauded; and with a view to prevent such defrauding, the Constitution empowers Congress to 'regulate' this branch of commerce. And to this the power extends, and no farther." [2]

This was the view also of Mr. Justice Johnson. "It is," he said, "to confer on her [a vessel] American privileges, as contradistinguished from foreign; and to preserve the government from fraud by foreigners, in surreptitiously intruding themselves into the American commercial marine, as well as frauds upon the revenue in the trade coastwise, that this whole system is projected." [3]

Here then is the explanation of the decision in Gibbons *v.* Ogden. The State law was invalid, not because it established a monopoly of interstate transportation, but because it amounted to a regulation of the coasting trade, a subject which had wholly been confided to Congress.

It is true, as already noticed, that the decree passed only upon the effect of the coasting license. For this reason it has often been said that the case turned not

[1] Lord *v.* S. S. Co., 102 U. S. 541. *Federalist*, No. 42.

[2] Speech of Silas Wood in House of Representatives, Jan. 15, 1824; Annals 18th Cong., 1st Sess., Vol. I, pl. 1055. See also remarks of Madison in Virginia Legislature quoted by Andrew Stevenson in House of Representatives, Jan. 29, 1824, *ibid.* 1275.

[3] Gibbons *v.* Ogden, 9 Wheat. 232.

upon the nature of the constitutional grant of power to Congress, but rather upon the construction of a Federal statute. This is true in a narrow sense only. In a broader sense, the decision involved a determination of the nature of the commercial power given to Congress. It was at best a forced construction which made a coasting license grant a right of navigation, and upon this branch of the case, Mr. Justice Johnson dissented. "It is impossible," he said, "with the views which I entertain of the principle on which the commercial privileges of the people of the United States among themselves rests, to concur in the view which this court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of the appellant. If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints. And I cannot overcome the conviction, that if the licensing act was repealed to-morrow, the right of the appellant to a reversal of the decision complained of, would be as strong as it is under this license." [1]

Chancellor Sanford of New York made the same criticism upon Chief Justice Marshall's opinion, with even greater emphasis. He said "that terms so indefinite as the words, 'coasting trade,' should have been used for the purpose of establishing rights of commerce, between different parts of the nation is not probable. That this should have been done without any known motive, when a full freedom of intercourse, both by land and

[1] p. 231.

water, existed among all the States, is a supposition still more improbable. To expound these terms of this law, thus made, as a grant of rights, when its provisions have a direct application to other objects, and when all those provisions have full effect, as restrictive regulations, would be a construction widely distant from the apparent intention of the legislature. . . . Still more without reason, is such a right inferred from the license, when registered vessels have the rights of the coasting trade, and yet have no license." [1]

That the rule of the case was restricted to the coasting trade appears from the course of legislation which the States pursued after this decision.

In 1848 Massachusetts granted the exclusive right to run steamboats on the Merrimac River between Haverhill and Lawrence [2] and in 1867 granted another monopoly on the same river between Mitchell's Falls, Lowell, and Lawrence.[3] In 1856 the State of Georgia granted a monopoly on the Chattahoochee River.[4]

The explanation of this legislation lies in the fact that the navigation thus monopolized did not fall within the description of coasting trade, as the term was then understood: —

[1] Steamboat Co. *v.* Livingston, 1 Hopk. Ch. 149, pp. 207–208. "We are inclined to say . . . that the term license is to be considered as of not more extensive meaning than letters patent, and confers no more right or authority, in the former case than in the latter; that is, it merely permits the free use of the thing patented, or of the waters licensed, provided, however, that, in either case the grant meets with no conflicting right of a third party." New York *Evening Post*, March 18, 1824.

[2] Act of May 3, 1848, Ch. 249, p. 741.

[3] Act of April 1, 1867, Ch. 115, p. 546.

[4] Act of March 1, 1856, No. 211, p. 270.

tioned.[1] Some grants, like that made by Vermont to Levi Pease in 1792, expressly contemplated the establishment of a monopoly of interstate transportation.[2]

When the Erie Canal was built it was the policy of the State of New York to give to the canal a monopoly of the transportation of merchandise between the East and the West. For this reason, when the Utica and Schenectady Railroad Company was incorporated, it was expressly enacted in the charter of the company that "no property of any description, except the ordinary baggage of passengers, shall be transported or carried on said road." [3]

Subsequently, that and the other roads, which now form part of the New York Central Railroad, were authorized to transport goods during the suspension of canal navigation, paying the Erie Canal Commissioners the toll which would have been required had the goods been carried on the canal.[4] In 1847, these roads were authorized to transport merchandise during the whole year, but upon payment of tolls as before.[5] The requirement of tolls was not abolished in New York until the completion of the Erie Railroad in 1851,[6] the very year in which Illinois imposed a similar charge upon rail-

[1] As illustrations of this sort of legislation see: N. Y. Act of Jan. 28, 1828, Ch. 21, p. 14; Act of April 21, 1828, Ch. 306, p. 399; Act of April 21, 1828, Ch. 340, p. 471; Act of April 17, 1829, Ch. 154, p. 250; Act of April 27, 1829, Ch. 276, p. 404; Act of April 19, 1830, Ch. 263, p. 288; Act of Feb. 16, 1831, Ch. 43, p. 41; Act of March 24, 1831, Ch. 83, p. 111.

[2] Act of N. Y., April 5, 1828, Ch. 169, p. 196; Act of S. C., Dec. 19, 1835, Vol. 8, Stats. S. C. 409; Act of Ky. Feb. 29, 1836, Ch. 342, pp. 426, 432.

[3] N. Y. Laws of 1833, Ch. 294, pp. 462, 466.

[4] Laws of 1844, Ch. 335, p. 518, 1 Rev. Stats. N. Y., 3d ed., p. 219, Part I, Ch. IX, title 2, Secs. 40, 45.

[5] Laws of 1847, Ch. 270, p. 298.

[6] Laws of 1851, Ch. 497, p. 927.

roads competing with the Illinois and Michigan Canal.[1] It appears from remarks made in Congress that the tolls imposed by New York rested upon transportation of grain from the Northwest and other interstate freight,[2] and this was doubtless true also of the tolls imposed by Illinois.

In 1833 the State of New Jersey granted to the Camden & Amboy Railroad Company a monopoly of transportation between New York and Philadelphia.[3] This provision was sustained in the State courts.[4] In 1861 it was found that this company was unable to meet the demands for the transportation of troops and supplies, and a government quartermaster impressed another railroad and passed over it some eighteen thousand men and four hundred tons of freight. For this the Camden & Amboy Company brought suit against the road so impressed and recovered from it the money received for this service.[5]

This monopoly aroused wide public interest and opposition at a very critical period, but there was no suggestion that it was illegal, and it was only destroyed by the passage of a Federal statute, giving all railroads operated by steam the right to carry goods and passengers from State to State.[6]

[1] Act of Illinois, Feb. 7, 1851, Priv. Laws, 1851, p. 47.
[2] Remarks of Senator Hale, Feb. 14, 1865, Cong. Globe, 38th Cong., 2d Sess., 794.
[3] Acts of N. J. 1829–1830, 83; Harrison Comp. N. J. Laws (1833), 284.
[4] Camden & Amboy R.R. Cases (1862), 15 N. J. Eq. 13; (1863) 16 *id.* 321 (1867), 18 *id.* 546.
[5] See speech of Senator Sumner, Feb. 14, 1865, Cong. Globe, 38th Cong., 2d Sess., 793; Senator Chandler, May 29, 1866, Cong. Globe, 39th Cong., 1st Sess., 2870; Senator Foot, Jan. 15, 1866, *id.* 227. Remarks of James A. Garfield, Cong. Rec., 45th Cong., 2d Sess., Vol. 7, Part 4, p. 3406.
[6] Act of June 15, 1866, U. S. Rev. Stats., Sec. 5258.

Clearly then, the right of a carrier to engage in interstate commerce was not at that time, as has recently been stated,[1] derived solely from the Federal Constitution, but was a right which a State might grant, or in some instances withhold, a rule which is in harmony with the theories of the Constitution and other decisions of the Supreme Court.[2] The rule that the Federal government can also by statute grant the right to a carrier by land was then new but is now well established. The case of Gibbons *v.* Ogden was not forgotten, but was considered inapplicable to such a monopoly.

In view of this history of constitutional practice it is not difficult to ascertain the meaning of Chief Justice Marshall's decision.

There was an open question in the early days of the Constitution whether a State might, under its powers to regulate its internal affairs, grant monopolies of navigation within its limits, or whether this was impliedly forbidden by the commerce clause. There was no doubt that by this clause power was given to Congress, to regulate navigation, foreign and coastwise, and to prevent State tariffs. To this extent the Federal power appears at all times to have been considered exclusive of State jurisdiction. If the Federal power extended no further than to such matters as were obviously within this field, the power throughout its whole scope was clearly exclusive. If the field of regulation were wider,

[1] Crutcher *v.* Kentucky, 141 U. S. 47.

[2] Gibbons *v.* Ogden, 9 Wheat. 1, 211; Bowman *v.* Chicago, &c., Railway Company, 115 U. S. 611. Opinion of C. J. Savage in Steamboat Co. *v.* Livingston, 3 Cow. 713. See also opinion of Chancellor Sanford, 1 Hopk. Ch. 149.

no such radical rule could be adopted, but a construction must be found which would be capable of adaptation to varying conditions.

Should the narrower definition be taken, the question would then arise whether the grant of such a monopoly as Ogden claimed under the laws of New York, constituted a regulation of navigation.

This latter question is the one with which the Court dealt. The decision, in tone and doctrine, therefore, takes its place not as the first of the new school of liberal construction, but rather as the last announcement of the earliest school of constitutional construction. In its implied definition of commerce, it looks backward, not forward — it belongs to the era of the stage coach.

There is an interesting question how far subsequent decisions have been influenced by a literal reading of the broad expressions of this case. There is little doubt that this influence has been felt, and that, in part at least, it explains the dissensions in later cases. "It has always appeared to me," said Mr. Chief Justice Taney in 1846, "that this controversy," over the meaning of the commerce clause, "has mainly arisen out of that case" (Gibbons *v.* Ogden), "and that this doctrine of the exclusive power of Congress, in the sense in which it is now contended for, is comparatively a modern one, and was never seriously put forward in any case until after the decision of Gibbons *v.* Ogden, although it has been abundantly discussed since." [1]

In 1849 Mr. Justice Woodbury said that "an expansive, and roving, and absorbing construction has, since"

[1] License Cases — Pierce *et al. v.* New Hampshire, 5 How. 581.

Gibbons *v.* Ogden, "been attempted to be given to the grant of the power to regulate commerce, apparently never thought of at the time it was introduced into the Constitution." [1] Notwithstanding these protests, the tendency of the Supreme Court has been to give the expressions of the opinion as literal an interpretation as possible under conditions which made an entirely literal application impossible. The development of the law will be followed with the later decisions. In the meanwhile to understand the history of the subject it is important to notice the principles to which the case of Gibbons *v.* Ogden calls attention.

1. Federal control over the three branches of commerce — foreign, interstate, and Indian — is not coextensive. The purposes which it was sought to accomplish in respect to these several branches of commerce are widely different, and the powers of the Federal government, being commensurate with the objects which it was sought to attain, differ in each instance in nature and extent.

2. Except as transportation was carried on by coastwise navigation, interstate carriers were originally within the jurisdiction of Congress only to such a limited degree as might be necessary to prevent restrictions upon the introduction of goods from other States, and possibly to prevent interference with travellers. Over the business of interstate carriage, as such, Congress had no jurisdiction.

"Congress," Mr. Justice Grier said in a later case, "has the exclusive power to regulate commerce; but that has never been

[1] Passenger Cases, 7 How. 558.

construed to include the means by which commerce is carried on within a State. Canals, turnpikes, bridges, and railroads, are as necessary to the commerce between and through the several States as rivers, yet Congress has never pretended to regulate them." [1]

Besides the important relations to constitutional development which have been considered, the case of Gibbons *v.* Ogden deserves attention by reason of its place in political history. Counsel for defendant in error in this case did not rest upon their denial of the exclusive nature of the Federal commercial power, but insisted that if a law passed by a State in the exercise of its acknowledged sovereignty come into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers.

Thus, eight years before the ordinance of South Carolina, the doctrine of Nullification was presented to the Supreme Court.[2]

In the opinion of the Court the supremacy of Federal authority and the exclusive character of the national power of regulation, were clearly defined.

In reading that momentous decision, apprehending as we do now the interests which were at stake, and with which the conclusion was pregnant, one cannot help pausing to wonder what might have been the result had that decision in any way been different from what it was. Had the utterance of the Court upon the powers of the

[1] The Passaic Bridges, 3 Wall. 792.

[2] The same subject had been before the United States Circuit Court in South Carolina a year earlier, and the decision rendered by Mr. Justice Johnson had supported the national authority. Elkison *v.* Deliesseline, 2 Wheel. Cr. Cas., 56.

States been ambiguous; had expression upon the relation of the States to the Federal government been avoided, and the element of nationality, which was involved, less explicitly been disclosed and asserted; had it been allowed to cripple the commercial power of the nation in any way, — where would the influence of that decision have led us now? We may find some suggestion of an answer to this question in the dissensions of the Court in New York *v.* Miln, in the Passenger Cases, the License Cases, and in the statement of Mr. Justice Barbour, that the police power of the State is "complete, unqualified and exclusive."

In the years to come, said Mr. Wayne MacVeagh, it will probably be recognized that among Chief Justice Marshall's decisions "none will surpass in permanent material advantage that decision which determined that the power to regulate commerce resided exclusively in Congress, and must be kept inviolate from any intrusion by the States, under any guise whatever." [1]

[1] Address at Marshall Centennial, reported in 180 U. S. 671.

CHAPTER IV

DECISIONS FROM 1824 TO 1851

THE next case upon the subject was Brown *v.* Maryland,[1] decided in 1827. This case involved the validity of a law of Maryland imposing a license tax upon importers for the privilege of selling imported goods.

The State law was held unconstitutional upon two grounds. In the first place, it was held that a tax upon the sale of imported goods by the importer and in original packages amounted to a tax upon imports, such as was prohibited by the express provision of the Constitution.

It is sometimes said that this doctrine, commonly called the "original package" rule was first announced in Brown *v.* Maryland. This is a mistake. The beginnings of the rule may be traced to State statutes adopted under the Articles of Confederation.[2] Until 1822 the exemption which was established by the decision in this case was recognized in the Maryland statutes,[3] and the same exemption existed under the statutes of Pennsylvania until 1824.[4]

[1] 12 Wheat. 419.

[2] See act of N. Y., March 22, 1784. Laws of 1777–1784, Ch. 10, p. 599; Act of April 11, 1787, Laws of 1785–1788, Ch. 81, p. 509.

[3] Freund, "Police Power," Sec. 81.

[4] See Pennsylvania, Act of April 2, 1821, Laws of 1821, Ch. 148, p. 244, and Supplement of March 4, 1824, Laws of 1824, Ch. 31, p. 32. The first statute imposed a license tax on sale of foreign goods, but excepted from its operation importers selling in original packages. The supplement abolished this exception. See Biddle *v.* Commonwealth, 13 S. & R. 405.

With the decision that the State law of Maryland was unconstitutional as imposing a tax upon imports, the Court could, and under the early views of the Constitution should, have stopped. Aside from the prohibition upon taxation of imports and exports the Constitution imposed no limitations upon the taxing powers of the States.[1] The Federal power over commerce, Edmund Randolph said, extends to "little more than to establish the forms of commercial intercourse between the States, and to keep the prohibitions which the Constitution imposed upon that intercourse undiminished in their operation; that is, to prevent taxes on imports or exports, preference to one port over another by any regulation of commerce or revenue, and duties upon the entering or clearing of the vessels of one State in the ports of another." [2] In practice, however, the application even of such a restricted power as Randolph outlined, extends further than his words seem to imply. There is no economic line which corresponds even roughly with the State boundaries. "The real truth is that a very nice line cannot be drawn between the Federal government and the States. . . ." [3] Complete regulation of commerce in one aspect imperceptibly extends to regulation of all commerce. Federal jurisdiction under the commerce clause to preserve undiminished the operation of that constitutional provision which forbids State taxation of imports, amounts in substance to a distinct limitation by the commerce clause upon the taxing

[1] Federalist, Nos. 32, 33.
[2] Opinion rendered to President, Feb. 12, 1791.
[3] Remarks on the amendments to the Federal Constitution. *American Museum*, February, 1789.

powers of the States. This was the second ground for the decision, and here, unconsciously and inevitably, began the extension by judicial construction of the Federal power over commerce.

In the consideration of this subject the debate turned upon the question whether the limitation upon the States was the result of Federal statute, or whether the power given to Congress, even when unexercised, itself forbade State legislation.

The power of Congress upon this subject, the Court said, was not dormant, and it was not necessary to decide whether its existence excluded all action by the States, although the Court indicated that the views expressed in the previous case had not changed.

Congress had expressly authorized importation by imposing a duty upon the article which the plaintiff in error had sold. The right to import, the Court said, involved a right on the part of the importer to sell, and any State law which imposed a tax upon the exercise of the right must be in collision with the Federal statute, and, therefore, invalid.

"This argument," Mr. Justice Daniel said in the License Cases,[1] "involves the palpable absurdity, that merchandise which the government does not so strongly favor as to admit without duty shall remain intact and sacred, whilst merchandise which is so much preferred as to be admitted freely — nay, whose introduction is in effect invited and solicited by the Federal government — may be burdened by the States at pleasure."

This criticism is well made if the decision be under-

[1] 5 How. 616.

stood as founded upon the proposition that by payment of the Federal tax the importer purchased the right to sell free from State interference. The right to sell cannot thus be purchased.[1] The argument of the Court emphasized the fact that the Federal power had been exercised, but for its conclusion rests upon the implication that Federal power over commerce was exclusive even when unexercised. In the language of the opinion, the power claimed by the State was "in its nature in conflict with that given to Congress," or, as stated in a later decision, the case held that "by the terms of the Constitution, the power to impose duties on imports was exclusive in Congress." [2]

Following these cases in 1829 came Willson *v.* Blackbird Creek Marsh Company.[3]

This case involved the validity of a law of Delaware, authorizing the erection of a dam across Blackbird Creek, a small stream wholly within the limits of that State. It was admitted that Congress had not legislated upon the subject, and, therefore, it seemed at first view as though the very question was raised, upon which the Court had expressed so definite an opinion, but which according to the view then held by some students, it had not been required to decide, in the two preceding cases. If the action of the State of Delaware was invalid, it was so because the dormant power possessed by Congress excluded all action whatever by the States.

The opinion, which was rendered by Mr. Chief Justice Marshall, is short, and without reference to the opinions

[1] Pervear *v.* Commonwealth, 5 Wall. 475.
[2] *Ibid.* p. 479.
[3] 2 Pet. 245.

which he had delivered in the previous cases. The Court said: —

"If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States; we should feel not much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

"We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

This opinion has met with widely varying interpretations, and has been considered inconsistent with the views expressed in Gibbons *v.* Ogden and in Brown *v.* Maryland.[1] The position which Mr. Chief Justice Marshall had taken in the previous cases was that the grant to Congress of the power to regulate commerce is exclusive because the power is itself a unit, incapable of division, and comprehends all foreign commerce and all commerce among the States;[2] or, as stated by Mr. Justice Strong, it was that the commercial power is so exclusively vested in Congress that no part of it can be exercised by a State.[3] It is plain, too, that the law of

[1] "Constitutional Decisions of John Marshall," by Mr. Joseph P. Cotton, Introduction, xxxiv. [2] Gibbons *v.* Ogden, 9 Wheat., at p. 194.
[3] Case of the State Freight Tax, 15 Wall. 232, 279.

Delaware upon which the case arose, was a law which Congress might have passed in effectuation of its general commercial power; for, aside from the opinion, which seems clear upon this point, we have the statement of Mr. Justice Thompson, who was upon the bench at that time, that this law was so regarded.[1]

On the other hand, it is improbable that the Court could have intended to disapprove the argument in both of the earlier cases in so brief a manner and without express reference. "There is not a man living, I suppose," said Mr. Justice Clifford in Gilman *v.* Philadelphia, "who has any reason to conclude that the constitutional views of the Court had at that time undergone any change;"[2] and ample confirmation of this view may be found in Mr. Justice Story's statement that Mr. Chief Justice Marshall agreed in his dissenting opinion in the case of New York *v.* Miln.[3]

It is possible by reading this case with the opinions in the two previous cases and in the light of subsequent history, to find in the comparison a foreshadowing of the present rule that the Federal power is exclusive in matters of general interest, while in local matters the States may legislate until their action is superseded by Congress.

It is probable, however, that the question to which the attention of the Court was directed and upon which Mr. Chief Justice Marshall passed, concerned the character of Blackbird Creek, rather than the nature of Federal power. State legislatures have always determined

[1] New York *v.* Miln, 11 Pet., at p. 149.
[2] 3 Wall., at p. 743.
[3] 11 Pet. 161.

whether or not a particular stream is navigable under the State law,[1] while Congress determines whether or not a stream is navigable under Federal law.[2] Some streams are of such national importance that even Congress cannot deprive them of the character of public interstate highways. In cases involving waters of this class, the right of navigation is protected by the Constitution. The fact that a body of water may be more or less capable of supporting navigation does not, however, place it entirely beyond State authority.[3] Between the two extremes mentioned there is a very large class

[1] *New York:* An Act declaring certain streams to be public highways, Act of Aug. 10, 1798, Laws of 1797–1800, p. 296; Act of April 17, 1851, Laws of N. Y., 1851, p. 421, declaring Moose River a public highway; *Illinois:* An Act declaring Cash River a navigable stream, Feb. 24, 1819, Revised Laws, 1819, p. 69; Big Beaucoup River, *id.* p. 73; Sangamon River, Act of Dec. 26, 1822, Laws of 1822–1823, p. 81; Big Vermilion River, Act of March 1, 1831, Laws of 1830–1831, p. 127; Embarrass River and Bon Pass Creek, Jan. 7, 1831, p. 126; Big Bay, Act of Feb. 22, 1833, Private Laws, 1833, p. 128; Big Muddy, Act of Jan. 31, 1835, Laws of 1834–1835, p. 56; Spoon River, Act of June 1, 1835, Laws of 1834–1835, p. 143; Crooked Creek, Act of Jan. 1, 1835, Laws of 1834–1835, p. 143; Act declaring certain streams navigable, March 1, 1837, Laws of 1836–1837, p. 167; McKees Creek, Act of March 1, 1837, Laws of 1836–1837, p. 168; Skillet Fork, Act of March 4, 1837, Laws of 1836–1837; p. 168; Act declaring navigable Mill and Big Creeks; Feb. 16, 1839, Laws of 1838–1839, p. 123; Mauvaise-terre, Act of Feb. 16, 1839, Laws of 1838–1839, p. 122; Fox River, Act of Jan. 15, 1840, Public Laws, 1839–1840, p. 98; the Snycarty, Act of March 4, 1843, Pub. Laws 1842–1843, p. 244. The Act of Alabama of Jan. 10, 1827, for improvement of Cahawba River provided that so far as the river was at that time navigable it should not be obstructed without consent of Congress, which subsequently was given. See Act Cong. May 24, 1828, 4 Stat. 308.

[2] Resolution of July 13, 1868, 15 Stat. 257; Act of May 6, 1870, 16 Stat. 121; Act of March 23, 1900, 31 Stat. 50. An Act declaring Cuivre River to be not a navigable stream, March 23, 1900, 31 Stat. 50. An Act to declare a branch of the Mississippi River opposite the City of LaCrosse and known as West Channel, to be unnavigable, Feb. 12, 1901, 31 Stat. 804. An Act defining the limit of navigation of the Osage River in the State of Missouri, March 4, 1904, 33 Stat. 58. An Act declaring Grand River, Missouri, to be not a navigable stream, Feb. 19, 1905, 33 Stat. 715. Act of Jan. 20, 1870, 16 Stat. 61, repeals so much of Act of Aug. 8, 1846, as declared the Des Moines River in the then territory of Iowa, a public highway.

[3] See Congressman Snyder's "Jeu d'Esprit," Dec. 23, 1842, Cong. Globe, Vol. XII, p. 83.

of cases in which the question whether a particular water constituted an interstate highway is one upon which Congress may decide as a legislative question. In the absence of such determination, and in cases involving waters of minor importance, the courts may well refuse to act in advance of Federal legislation.[1]

This, apparently, is the extent of the ruling in Willson *v.* Blackbird Creek Marsh Company.

The influence of Slavery. With these decisions, the first period of judicial construction of the commerce clause comes to an end. Between the year 1829, when the Willson case was decided, and the year 1837, when New York *v.* Miln was decided, the slave power had become the dominant political influence.

In its relation to constitutional principles the great characteristic of the slave system was its opposition to free labor, — that is, labor directly competing with but outside the control of the system. Generally this opposition was of a local nature, involving State or municipal laws alone, but sometimes, when the effort was made to exclude free laborers from other States, Federal questions arose involving the relation of the States to each other and to the national government.

Had slavery been, as the South insisted, a purely domestic institution in the States where it existed, it could not have entered national politics. The system depended, however, upon exclusion of free competition; that is, as has been said, the necessity which required

[1] See opinion of Mr. Justice McLean, Passenger Cases, 7 How. 398.

that it should dominate wherever it existed made it particularistic and exclusive.[1] This was the origin of Calhoun's theories of the Constitution, and of those influences which forced the system of arbitrary control from the position of a domestic institution into the broad field of national politics. By the Constitution, Congress is given a national power of commercial regulation. Let such a power once be established, and no State could exclude its operation. By the Constitution, citizens of each State have the rights and privileges of citizens of the several States, and wherever this was recognized any person could move from one State to another and freely compete there for labor. But the exercise of this right in Southern States plainly would be nothing less than the substitution of competition for a system of arbitrary control. For this reason many States forbade immigration of free persons of color. In pursuance of this policy South Carolina, in 1822, passed a law of which the third section enacted "that if any vessel shall come into any port or harbor of this State from any other State or foreign port having on board any free negroes, or persons of color as cooks, stewards or mariners, or in any other employment on board of said vessel, such free negroes or persons of color shall be liable to be seized and confined in gaol, until such vessel shall clear out and depart from this State; and that when such vessel is ready to sail, the captain of said vessel shall be bound to carry away the said free negro or free person of color." In many ways the statute bears a striking resemblance to the law of Louisiana which the United States Circuit Court

[1] First annual message of President Johnson.

declared unconstitutional in 1895,[1] and which provided "that no sailor or portion of the crew of any foreign sea-going vessel shall engage in working on the wharves or levees of the City of New Orleans, beyond the end of the vessel's tackle."

In 1823 the validity of the South Carolina law was attacked before Mr. Justice Johnson of the United States Supreme Court sitting on circuit in Charleston. By the Federal Constitution, citizens of each State are entitled to the privileges and immunities of citizens of the several States, and among the rights thus secured is "the right of a citizen of one State to pass through, or to reside in any other State, for the purposes of trade, agriculture, professional pursuits, or otherwise."[2] This was the very right which South Carolina denied.

The position in which Mr. Justice Johnson was placed must have been exceedingly difficult. The question presented was one which commonly awoke excitement, he was alone on the bench, and the weight of public sentiment in the community where he sat supported the organized system of the South. Like other judges of the Federal circuit and district courts, and like most of the Federal justices, Mr. Justice Johnson had been a resident of the circuit to which he was assigned. He knew the tendencies of public opinion, and was so situated as to feel their force. There must have been a strong temptation to yield to all these influences. Con-

[1] Cuban S.S. Co. *v.* Fitzpatrick, 66 Fed. Rep. 63.

[2] Corfield *v.* Coryell, 4 Wash. C. C. Rep. 381. Von Holst, "Constitutional History of the United States," 1846–1850, p. 140, n. 1. Speech of John Bacon of Massachusetts in House of Representatives, Feb. 7, 1803. Annals 7th Cong., 2d Sess., 467.

gress itself, when petitioned by Northern sailors for relief against this law, felt the pressure, for it took no action, and, as Professor Von Holst remarks, "either considered the matter too unimportant to bother itself about, or else considered it prudent to let such a ticklish question alone." [1] In the Federal court, no room was found for such considerations. It was under these circumstances that there was rendered the first of that long series of decisions by which the Federal courts have consistently maintained the right of every citizen to follow any lawful occupation at any place in the country. More than this, Nullification was for the first time declared unconstitutional. The United States Constitution, "the most wonderful instrument ever drawn by the hand of man," said Mr. Justice Johnson in language suggestive of the famous phrase afterward used by Mr. Gladstone, created a paramount government which a State cannot throw off at its own will and pleasure.[2]

Notwithstanding this decision and the decision of Gibbons *v.* Ogden rendered by the Supreme Court in the year following, South Carolina continued to enforce the unconstitutional statute, and her example was followed in Louisiana by the passage of a similar act, while at the same time the illegality of the proceedings was tacitly recognized when, upon the protest of the English government, an exception in the operation of the statute was made in favor of foreign vessels. The freedom thus given to foreigners, however, the Federal government

[1] "Constitutional History of the United States," 1846–1850, p. 129.
[2] Elkison *v.* Deliesseline, 2 Wheel. Cr. Cas. 56.

was unable to procure for its own citizens, and the matter although often agitated [1] rested until 1844, when the State of Massachusetts sent Samuel Hoar to Charleston, and Henry Hubbard to New Orleans, there as its agents to take such legal steps as might be necessary to procure the discharge of citizens of Massachusetts imprisoned under these laws.

The arrival of these representatives in the cities to which they were sent created great excitement. It immediately became apparent that the labor question was not to be treated as other questions, that the law was not to be applied to it as to other subjects, but that its issues were to be determined in the street and by force. In both cases the mission was fruitless and the effort to appeal to the courts was abandoned. The laws directed against free labor, solely because it was free, remained upon the statute books of Southern States, "until they were swept away by the fire and blood which destroyed the guilty cause itself." [2]

During this period the cases of New York *v.* Miln,[3] the License Cases,[4] and the Passenger Cases [5] afforded occasion for the argument of questions which very closely concerned the underlying issues between free and slave States.

From a constitutional point of view these questions were extremely difficult.

[1] Report No. 80, House of Representatives, 27th Cong., 3d Sess., Jan. 20, 1843; Validity of South Carolina Police Bill, 1 Op. Atty. Gen. 659; 2 *id.* 426; The Cynosure, 1 Sprague 88; The William Jarvis, 1 Sprague 485; The Brig Wilson, 1 Brock. 423.

[2] Henry Wilson, "Rise and Fall of the Slave Power," Vol. 1, p. 585.

[3] 11 Pet. (1837) 102.

[4] 5 How. (1847) 504.

[5] 7 How. (1848) 283.

On the one hand, as has been seen, the Constitution gave the citizens of each State the privileges and immunities of citizens in the several States.

On the other hand, the Constitution left each State to determine for itself what immigration should be permitted. On Sept. 16, 1788, the Congress of the Confederation "recommended to the several States to pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States." The resolution, moved by Mr. Baldwin, seconded by Mr. Williamson, both of whom had been members of the Constitutional Convention, was, said Mr. Justice Thompson,[1] a strong contemporaneous expression of the opinion of Congress that under the new Constitution the power to control immigration from foreign countries lay with each State. As illustrating the difficulty of the question, it is noticeable, however, that the fourteenth article of the English treaty of 1794, Jay's treaty, provided that British subjects might freely come, with ships and cargoes, etc.[2]

So far as concerned communication by land between the States, the rule was clear. "The State governments," it was said, "have always possessed the power of stopping or taxing passengers; that power they have never given up," [3] and Mr. Justice Thompson urged that passengers by sea had no greater rights within a State

[1] New York *v.* Miln, 11 Pet. 102, 149.

[2] For a discussion of this provision see 7 How. 451, 472, 506, 569.

[3] Annals 2d Cong., 303–309. In December, 1818, it was proposed to Congress to prohibit the migration or transportation of slaves or colored servants from one State to another in violation of State law. This was defeated on the ground that the subject was exclusively within State jurisdiction. Annals 15th Cong., 2d Sess., 336.

"than if they had come by land from an adjoining State." [1]

The provisions of the Constitution relating to the questions at issue between the two sections of the country were inconsistent with each other, the subject was not covered by the commerce clause, and a solution could only be reached taking the Constitution as a whole, by a determination of the character of the government which it created and of the relations under it of the States to each other. These, however, were the questions which it required civil war to settle. At the conclusion of that war, the Supreme Court affirmed the right of free passage from State to State, not as a result of the construction of any clause or provision of the Constitution, but because this right is essential to the existence and administration of the nation.[2]

In the meantime, so far as the cases in view of the extreme dissension on the bench can be said to decide anything, it was held in New York *v.* Miln[3] that a State may require the master of a vessel to report his passengers to State authorities; in the License Cases,[4] that a State may tax the sale of liquor brought from another State, etc.; and in the Passenger Cases,[5] that a State may not tax passengers arriving from foreign countries. The fact of these decisions is, however, of less consequence than the arguments which were used, for out of the confusion which was inevitable when one party sought to establish complete national powers for a government which the other party regarded as a mere league of

[1] New York *v.* Miln, 11 Pet. 102, 147. [3] 11 Pet. 102.
[2] Crandall *v.* Nevada, 6 Wall. 35. [4] 5 How. 504. [5] 7 How. 283.

States, there resulted as a compromise a wider power than had ever before received judicial sanction, a power which, being capable of expansion, might well have satisfied the one party, while being adaptable to special circumstances in each case, it afforded protection to the interests of the South.

This solution, which Mr. Webster had suggested in his argument of Gibbons *v.* Ogden, was taken up by Mr. Justice Woodbury in the License Cases, and again in the Passenger Cases. The Federal power over commerce, he said, is not to be considered as a whole, but creates a jurisdiction in which Federal power is in some respects exclusive and in other respects concurrent with State power.

"When I say much was left, and meant to be left, to the States in connection with commerce, I mean concerning details and local matters, inseparable in some respects from foreign commerce, but not belonging to its exterior or general character, and not conflicting with anything Congress has already done. . . . So far as reason exists to make the exercise of the commercial power exclusive, as on matters of exterior, general and uniform cognizance, the construction may be proper to render it exclusive, but no further, as the exclusiveness depends in this case wholly on the reasons, and not on any express prohibition, and hence cannot extend beyond the reasons themselves. Where they disappear the exclusiveness should halt. In such case, emphatically, *cessante ratione, cessat et ipsa lex.*" [1]

The fact that Congress has not legislated, he said, is prohibitory of State action only where the subject of legislation is itself incapable of divided control. "In

[1] 7 How. 559.

other cases, when the power of Congress is not exclusive and that of the States is concurrent, the silence of Congress to legislate on any mere local or subordinate matter within the limits of a State, though connected in some respects with foreign commerce, is rather an invitation for the States to legislate upon it." [1]

In Cooley *v.* Port Wardens,[2] the next case involving this question, the distinction made by Mr. Justice Woodbury in the License and Passenger Cases was adopted as the rule of decision. In delivering the opinion of the Court Mr. Justice Curtis said: —

"The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part."

Subsequent cases, apparently by inadvertence, have broadened even this broad rule. Cooley *v.* Port

[1] 7 How. 559. [2] 12 How. 310, 319.

Wardens held that the Federal power was exclusive in cases "which admit only of one uniform system" of regulation. In the case of the State Freight Tax, Mr. Justice Strong, referring to this case, said the rule had been announced with great clearness "that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive regulation by Congress." [1] The rule as thus stated is broader than the argument by which it was established, but in this form it has been quoted and followed in many cases.[2]

Final Statement of the Rule as to Exclusiveness. The distinction thus advocated by Mr. Webster, approved by Mr. Justice Woodbury, and authoritatively adopted by the Court in the opinion of Mr. Justice Curtis, has now in this broadened form become the well-settled rule of the Federal courts. The States may establish port regulations, regulations of pilotage, may improve their harbors and rivers, erect bridges and dams, and exercise many other local powers. In the exercise of its proper authority, a State may enact laws providing for the inspection of goods, to determine whether they are fit for commerce, and to protect the citizens and the market from fraud. But in all such cases, as was said in Leisy *v.* Hardin, though the States may exercise powers which may be said to partake of the nature of the power

[1] 15 Wall. 232, 280.

[2] See Welton *v.* Missouri, 91 U. S. 275, 280; Henderson *v.* Mayor of N. Y., 92 U. S. 259, 272; Mobile *v.* Kimball, 102 U. S. 691, 701.

granted to the general government, they are strictly not such, but are merely local powers, which have full operation until circumscribed by the action of Congress in effectuation of the general power.

In matters admitting uniform regulation throughout the country and affecting all the States, the inaction of Congress is to be taken as a declaration of its will that commerce shall be "free and unrestricted" so far only as concerns any general regulation by the States.

On the other hand, in matters of local nature, such as are auxiliary to commerce rather than a part of it, the inaction of Congress is to be taken as an indication that for the time being, and until it sees fit to act, they may be regulated by State authority.

Since the decision of Cooley *v.* Port Wardens, the rule therein laid down has been followed in every case in the Supreme Court upon this subject. It is perhaps the most satisfactory solution which has ever been given of this vexed question,[1] and "may be considered as expressing the final judgment of the Court." [2]

[1] Crandall *v.* Nevada, 6 Wall. 35, 42.

[2] Mobile *v.* Kimball, 102 U. S. 691, 702; Bowman *v.* R. R. Co., 125 U. S. 465, 507; Atlantic & Pacific Co. *v.* Phila., 190 U. S. 160; Bridge Co. *v.* Kentucky, 154 U. S. 204; Leisy *v.* Hardin, 135 U. S. 100; Stoutenburgh *v.* Hennick, 129 U. S. 141; Telegraph Co. *v.* Pendleton, 122 U. S. 347; Steamship Co. *v.* Pennsylvania, 122 U. S. 326; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444; Robbins *v.* Taxing District, 120 U. S. 489; Wabash, etc. R. R. Co. *v.* Illinois, 118 U. S. 557; Walling *v.* Michigan, 116 U. S. 446, 455; Brown *v.* Houston, 114 U. S. 622; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196; Cardwell *v.* Bridge Co., 113 U. S. 205, 210; Transportation Co. *v.* Parkersburgh, 107 U. S. 691, 701, 702; Escanaba Co. *v.* Chicago, 107 U. S. 678, 687; Packet Co. *v.* Catlettsburg, 105 U. S. 559; Tiernan *v.* Rinker, 102 U. S. 123; Hall *v.* DeCuir, 95 U. S. 485; R. R. Co. *v.* Husen, 95 U. S. 465; Pound *v.* Turck, 95 U. S. 459; Foster *v.* The Master, etc., of the Port, 94 U. S. 246; Henderson *v.* Mayor, etc., 92 U. S. 259, 272; Welton *v.* Missouri, 91 U. S. 275; Case of State Freight Tax, 15

This rule has, however, brought its own difficulties. Not only is the decision a departure from the intention of the Constitution, but it is also a departure from legal principles.

The question whether or not a given subject admits of but one uniform system of regulation, is a legislative question, except in cases, like Gibbons *v.* Ogden, for instance, so clear that the legislature cannot legitimately supersede the judicial determination. The rule in Cooley *v.* Port Wardens is not, however, so restricted, but holds that in all matters which demand a single uniform rule, — or as the doctrine is broadened by later cases, in all matters which admit of a single uniform rule, — the silence of Congress is equivalent to a declaration that commerce shall be free. Upon this subject Professor Thayer remarks that —

"If it be said . . . that the courts have merely been construing the silence and non-action of Congress, as being a declaration that no rule is required, and enforcing that, we do not really escape from the difficulty just mentioned. As regards State regulations of commerce in matters which do not require uniformity of rule, it is admitted that the silence of Congress is not conclusive against them; some positive intervention of Congress is required. If, then, the courts would know in any given case of a regulation of commerce what the silence of Congress means, how are they to tell unless they first determine under which head the given regulation belongs, that of regulations requiring a uniform rule, or of those which do not? . . . It may then be conjectured that the decisions of the Federal courts are likely to incline as time goes on,

Wall. 232, 279; Ward *v.* Maryland, 12 Wall. 418; Hardy *v.* R. R. Co., 32 Kan. 698; Master, etc., of Port of New Orleans *v.* Ship "M. J. Ward," 14 La. Ann. 287; Commonwealth *v.* Huntley, 156 Mass. 236; Lumberville, etc., Co. *v.* State Board, 55 N. J. L. 529.

to the side of leaving it to Congress to check such legislation of the States as may be challenged on the ground now in question, and of limiting its own action, in respect to such cases, to that class of State enactments which is so clearly unconstitutional that no consent of Congress could help the matter out." [1]

In other words, the effort which the Court made in Cooley *v.* Port Wardens to find a field in which Mr. Chief Justice Marshall's decision could literally be applied, involves in Professor Thayer's opinion logical difficulties from which in time the Court will incline to retreat.

The important consideration which the decision in Cooley *v.* Port Wardens presents, is not, however, in the question whether its rule will prove to be "the final judgment of the Court" but in the opportunity which it offered for development of the Federal power.

[1] Cases on Const. Law, 2190–2191.

CHAPTER V

EXTENSION OF FEDERAL POWER OVER CARRIERS

THE most conspicuous instance of this development is found in the newly acquired jurisdiction over interstate transportation.

As originally formed, the Constitution gave Congress power to regulate foreign commerce and the coasting trade. These two branches of commerce are often mentioned as though separate. In fact, however, the control of foreign commerce to be effective involves control of the coasting trade, for American vessels, whatever their destination, while upon the high seas are engaged in navigation with the ships of other nations thus of necessity within national jurisdiction,[1] while foreign vessels passing from one American port to another in order to complete delivery of their cargoes engage to this extent in coasting trade. It was entirely appropriate, therefore, that in drafting the clause which gave to Congress power to regulate this subject, terms should be employed which referred distinctively to foreign intercourse.[2] To

[1] Lord *v.* Steamship Co., 102 U. S. 541.

[2] That the word "commerce" was characteristic of trade with foreign nations appears in the law dictionaries used when the Constitution was formed. Thus Giles Jacobs says: "There is a distinction between commerce and trade; the former relates to our dealings with foreign nations, or our colonies abroad, the other to our mutual traffic and dealings among ourselves at home. . . ." Burrill also says: "A distinction is frequently made between commerce and trade properly so called, the latter, intercourse between

go further than this, and to hold, as some have argued, that Congress was given no independent power to regulate interstate commerce, but that the clause should be read as conferring power of regulation only over commerce which being conducted with foreign nations extends among the several States,[1] is probably incorrect. Congress was given one single power of regulation which to varying extent might be exercised over three subjects — foreign, interstate, and Indian commerce. The power was, however, of external, not of internal regulation, and did not touch communication conducted among the States by highways or ferries — or by any means other than coastwise navigation.

citizens and subjects of the same nation, and the former seems almost *ex vi termini* to import intercourse by means of shipping to be used as the synonym of maritime."

Beawes, "Lex Mercatoria," p. 1, thus defines the word: "Commerce is that intercourse with foreign nations, which is carried on from one country to another by means of navigation, either for the exchange of commodities, or for the sale or purchase of them, through the medium of money. Commerce then has its basis in navigation, and is supported by exports and imports, whereas simple trade may be transacted independent of these elements and commerce. And herein chiefly consists the difference." See speech of J. W. Singleton, *infra*.

[1] "If the Constitution had simply given to Congress the power to 'regulate commerce with foreign nations' and then stopped, omitting the words 'and among the States,' the question would naturally arise, what commerce? It could not regulate the commerce between two foreign nations. Then what commerce is to be regulated? The answer is found by adding to the words of the supposed grant, the words of the grant itself. . . . The commerce subject to its regulations must have its inception in a foreign nation. The voyage that brings the material to be converted, sold, or exchanged on our shores must begin in a foreign country and end among the States, or *vice versa*." Speech of J. W. Singleton of Illinois, Feb. 4, 1881, 46th Cong., 3d Sess., Cong. Rec., Vol. 11, Part III, Appendix pp. 74–81. Pinckney's motion in the Convention, Aug. 29, 1787, "that no act of the legislature for the purpose of regulating the commerce of the United States, with foreign powers, among the United States, shall be passed without the assent of two-thirds," etc., is so worded as to suggest that the limitation referred only to commerce of this character. Both Pinckney and Paterson, however, had advocated a grant to Congress of power to regulate commerce of the States "as well with foreign nations as with each other," and this was probably the meaning of the phrase reported by the Committee of Detail on August 6.

On the other hand, so far as concerned that commerce which fell within Federal control, the power of Congress was not restricted to the control of navigation which crossed State lines, but included all coastwise and foreign navigation. Federal statutes requiring the enrolling and licensing of vessels engaged in the coasting trade have, from the earliest days, applied to all vessels so engaged, though employed in navigation between ports in the same State. The Federal power over this subject, said Haines, in arguing the case of Steamboat Co. *v.* Livingston,[1] is "an entirety," extending wherever coastwise and foreign navigation extends. That the Federal power was limited to control of navigation beginning in one State and ending in another, was, he said, a novel construction owing its origin to the steamboat controversy, not intended in 1787 and not to be followed when that great controversy should be ended.

Over this commerce Federal power extended, as has been shown, so far as to enable Congress to control foreign relations, to tax foreign commerce, to exclude foreign vessels from the coasting trade, and to protect commerce among the States from restrictions forbidden by the Constitution.[2]

To this extent, then, Federal power over navigation imported a limited jurisdiction over carriers. The duties which the carrier owed to the public were, however, even in the case of transportation extending across

[1] 1 Hopk. Ch. 149, 159.

[2] Message to Congress, May 4, 1822; speech of William H. Crawford in Senate, Feb. 11, 1811; Annals 11th Cong., 3d Sess., pl. 139; see also speech of William Drayton of South Carolina in House of Representatives, Feb. 26, 1828, Cong. Deb., Vol. IV, Part II, pl. 1635–1636.

State lines, derived from the State, not from the United States, and were unaffected by this new jurisdiction. The right to engage in interstate commerce, together with the correlative duty of the carrier to receive, carry, and deliver, originates, as already shown, in State law. This subject, both by reason of its importance and of the uncertainty which appears in many of the decisions, requires consideration.

By English law a common carrier was under an imposed duty to receive, carry, and deliver, and while goods were in his possession to answer for them as insurer save as against two perils, — acts of God and of public enemies. The obligation which is thus stated in double form was in fact a single duty, — that to carry safely, — the power which imposed the duty measuring also the extent of the liability thus created.

As early as the reign of Charles II it was held that the liability of an insurer rested upon a carrier engaged in foreign commerce,[1] and though in this case the loss occurred in England, nevertheless the liability was regarded as attaching to the carrier so long as he had charge of the goods; — the duty was not restricted to the territory of the sovereign which imposed it.[2] In this country many cases of the same character exist and the rule appears to be well settled.[3]

In most instances, however, the cases concern the carrier's liability after acceptance of the goods, and although the power of the sovereign which imposed this

[1] Mors *v.* Slue, T. Raym. 220.
[2] Nugent *v.* Smith, 1 Com. Pl. Div. 19, 23; Elliott *v.* Rossell, 10 Johns. 1.
[3] See review of early decisions by Chancellor Kent in case last cited.

liability must have extended also to impose the duty of acceptance, nevertheless there was no express decision upon this point, so far as concerned transportation beyond the realm of England, until the case of Crouch *v.* London & Northwestern Railway[1] in 1854. This was an action to recover damages caused by defendant's refusal to accept goods as a common carrier, for transportation from London to Glasgow. On the part of the railway company, it was urged that the duty of carriage did not extend beyond the realm by whose law it was imposed. Upon this subject Jervis, C. J., said: —

"It is not denied, — although the authorities on the subject are neither numerous or satisfactory, — that, if a man holds himself out as a common carrier between two places which are within the realm, he is bound to carry all goods (within reasonable limits) that may be tendered to him to be carried between those places. The only question that arises upon this part of the case, is, whether that rule applies where one of the termini is a place out of England. I am of opinion that it does. Where a party who holds himself out as a common carrier accepts goods, the common law, — that is the law founded upon the custom of the realm, — engrafts upon such acceptance a contract to carry safely and to insure, subject only to two exceptions, viz., the act of God and the Queen's enemies. It was admitted in the course of the argument, and indeed it could not be denied, that, if the defendants had accepted the goods in London, the common law obligation to carry them to Glasgow would have attached. The case of Morse *v.* Slue, 1 Ventr. 190, T. Raym. 220, 1 Mod. 85, 2 Keble 866, 3 Keble 75, 112, 135, 2 Levinz 69, is admitted to be an authority to that extent: and Molloy's commentary on that case[2] puts the matter beyond doubt. If, then, it is admitted, that, when once the defendants have held themselves out to be common carriers, there is

[1] 14 C. B. 255. [2] De Jure Maritimo, Book II, Ch. 2, Sec. II.

engrafted upon their acceptance of the goods to be carried a common law liability to carry to all places to which they profess to carry, even if one of those places should be beyond the confines of the realm, it would seem that they must equally take upon themselves the other part of the common law liability of carriers, viz., an obligation to accept all goods which reasonably are offered to them for conveyance to and from the places to which they profess to carry, whether one of those places be without the realm or not."

In this opinion Cresswell, J., concurred, saying: —

"It is said that they (the defendant company) cannot be common carriers from London to Glasgow, because a portion of the latter journey is beyond the confines of England. I apprehend, however, it is clear that the defendants may be common carriers out of the realm as well as within it. A common carrier is one who, in the language of Lord Holt, in Coggs *v.* Bernard, 2 Lord Raym. 909, exercises a public employment; and the law charges him 'to carry goods, against all events, but acts of God and of the enemies of the King.' Morse *v.* Slue is a direct authority, that, though the contract be to carry to a place out of the kingdom, the liability of the common carrier attaches to them as to one incident, viz., the obligation safely to carry and deliver; and, if so, I cannot see why the other incident, viz., the obligation to accept goods for conveyance, where offered in a reasonable time, and under reasonable circumstances, should not also attach."

By common law, therefore, the carrier's duty to receive, carry, and deliver arose from the law of the State where the transportation originated and followed the carrier through other jurisdictions until performance was complete.

It has been suggested that the carrier's obligation arises not from State law, but from contract; that the law of the State imposes a duty to accept for carriage to any point upon the carriers' line, whether within the

State or beyond its boundary, and that when accepted the carriers' rights are dependent upon the contract. This apparently was the opinion of Jervis, C. J., and Cresswell, J., in the case of Crouch *v.* London & Northwestern Railway. The view was followed in Nugent *v.* Smith.[1] This theory explains nothing. It needs no decision to establish that "persons may voluntarily contract to do what no legislature would have the right to compel them to do," [2] but the question upon which these cases pass concerns solely the State authority to compel. If the States are without jurisdiction to impose the obligation of carriage beyond their borders, the jurisdiction cannot be acquired by calling the obligation a contract rather than a duty.

Furthermore, as the theory is stated, the carrier is under no obligation to make any contract save that which is imposed by law, and the obligation thus arising exists without his assent. Clearly this is the statement, not of a contractual, but of a legal duty, and so it is held.

"To impose upon the carrier the duty of receiving and carrying, . . . requires no contract." [3]

The duty which rests upon interstate carriers is the same in character as that which rests upon all other carriers. It is "founded on the custom of the realm at common law and is independent of contract, being imposed by law for the protection of the owner and founded upon public policy and commercial necessity." [4]

[1] 1 Com. Pl. Div. 19–23.
[2] Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 697.
[3] Inman *v.* St. Louis, etc., Co., 14 Texas Civ. Ap. 49; 37 S.W. Rep. 37–41.
[4] Chitty on Carriers, 34, 35; Packard *v.* Taylor, 35 Ark. 402; Clyde S. S. Co. *v.* Burrows, 36 Fla. 121, 122.

This duty arises when goods are tendered for transportation and before any actual contract is made.[1]

The result of these authorities appears to be that the duty of an interstate carrier to receive, carry, and deliver goods is derived from the law of the State from which the goods are sent; that this duty is indivisible by State lines and follows the goods from origin to destination.

Foreign States may restrict this duty even to the point of forbidding entrance, but in the absence of such laws, and so far as concerned English law, the carrier remained subject to his initial duty until delivery of the goods. This rule prevailed here before the adoption of the Constitution. The conduct of commerce was, however, under the conditions of that time, much embarrassed by conflicting and discriminating State legislation, and to avoid impediments, which concerned not the existence but the exercise of the right, Congress was empowered to regulate interstate commerce. Without such provision it was anticipated that,

"Each State, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions which would beget discontent. The habits of intercourse, on the basis of equal privileges, to which we have been accustomed from the earliest settlement of the country, would give a keener edge to these causes of discontent than they would naturally have, independent of this circumstance."[2]

All this it was intended by the Constitution to prevent,[3] and what the States are thus forbidden to do is

[1] Bluthenthal *v.* Railway, 84 Fed. 920.
[2] R. R. Co. *v.* Richmond, 19 Wall. 584.
[3] *Federalist*, No. 7.

equally forbidden to individuals.[1] It was not expected that Congress might or could itself restrict the free intercourse which had so long existed, for the purpose of the grant was to establish "unrestrained intercourse between the States." [2]

The intention of the makers of the Constitution then, was to preserve existing rights, freeing their exercise from interference, and the history of the commercial regulations by Congress, and by the States, shows that no change in origin of fundamental rights was intended.[3]

This was the meaning of the grant of power to regulate commerce with foreign nations and among the States.

Besides the limitations which result from the nature of Federal jurisdiction over both foreign and interstate carriers, it must be observed, too, that Federal power over foreign commerce is much broader than the power over commerce among the States.

The distinction has been recognized in the administra-

[1] *In re* Debs, 158 U. S. 564; Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211.

[2] *Federalist*, No. 11.

[3] "Will any one claim that we have authority to create a steamship corporation to trade between New York and Philadelphia, or any other port, at home or abroad, subject to certain rates of fare and freight?" Speech of Bird of New Jersey in House of Representatives, March 12, 1870, Cong. Globe, 41st Cong., 2d Sess., Part III, p. 1908.

"I think that no one can read the history of those times without becoming satisfied that the framers of the Constitution had in mind when they granted to Congress the power 'to regulate commerce between the several States' a very different thing from the regulation of common carriers." Senator Byron M. Cutcheon of Michigan, Dec. 16, 1884. Cong. Rec., 48th Cong., 2d Sess., Vol. 16, Part III, Appendix, p. 47.

"What right has Congress to regulate common carriers, shippers, and warehousemen beyond that which is necessary to prevent a State from obstructing that commerce which comes across her borders?" Oates of Alabama in House of Representatives, Jan. 20, 1887, Cong. Rec., Vol. 18, Part I, p. 847.

tion of government from the very beginning. It has been understood that to make its exclusions effective Congress could forbid or permit foreign commerce and license the coasting trade, but that with these exceptions, transportation across State lines was conducted under State laws, and was an operation which the Federal government could neither permit nor forbid. In 1852, when it was sought to extend the coasting laws to ferry-boats operating across the Mississippi River between Missouri and Illinois, the court said:—

"A license from the United States and a license from a State cannot both be necessary to do the same thing. . . . A license conveys the right to do the thing or it conveys no right; if it conveys the right to do the thing, then no other or further conveyance from any person can be necessary. A license from the United States to carry on the coasting trade, it is urged, is necessary for a steam ferry-boat. If this be so, then a license from the State would be of no avail, and need not be obtained. The States have exercised the right to license and regulate ferries from the commencement of the government to this day." [1]

The doctrine of this case was approved in 1861 by the Supreme Court.[2]

It is, therefore, well established that, so far as concerns power over interstate communication, a Federal license is not required for the conduct of an interstate ferry not engaged in coastwise navigation, and that the possession of such a license does not authorize a vessel to engage in such ferriage in violation of State law.[3]

[1] The Steam Ferry Boat, William Pope, 1 Newb. Adm. 261.

[2] Conway *v.* Taylor's Executor, 1 Black 603.

[3] Newport *v.* Taylor, 16 B. Mon. (Ky.) 699; Chilvers *v.* People, 11 Mich. 43; Midland Ferry Co. *v.* Wilson, 28 N. J. Eq. 537; Carroll *v.* Campbell, 108 Mo. 550.

In this respect the rule applicable to ferries was in no way exceptional. A ferry is a public highway, — "a continuation of a road," and the rule applied to it was the one applicable to all other carriers. The important fact is that all transportation, when considered as a business in itself and in relation to the carrier, except foreign commerce and the coasting trade, was within State control and beyond Federal jurisdiction.

Federal powers over interstate commerce being then small in extent, very few restrictions were needed. Congress had been given authority to raise revenue by a tariff on foreign commerce. This power was restricted by the rule of uniformity and by the provision that no tax or duty should be laid on articles exported from any State. Congress was given a limited authority over coasting navigation, but had no control over communication by land, or by interior waters. Its power over navigation was restricted by the provisions that no preference should be given to ports of one State over those of another, and that vessels bound to or from one State should not be obliged to enter, clear, or pay duties in another.

Aside from this, the Federal power over commerce, Edmund Randolph said,

> "extends to little more than to establish the forms of commercial intercourse between the States and to keep the prohibitions which the Constitution imposes upon that intercourse undiminished in their operation; that is, to prevent taxes on imports or exports, preferences to one port over another by any regulation of commerce or revenue; and duties upon entering or clearing of the vessels of one State in the ports of another."[1]

[1] Opinion on U. S. Bank Bill, Feb. 12, 1791; see *Federalist*, No. 42.

So far as concerns commerce among the States, therefore, the rule of the Constitution was free ships, free goods, and, except in the foreign and coasting trade, non-interference with carriers. From these small beginnings the present Federal power has developed.

In Gibbons *v.* Ogden,[1] a case which concerned only the Federal power over navigation, the power was declared to be exclusive. In Brown *v.* Maryland[2] it was held that a State tax upon the sale of imported goods by the importer in original packages was prohibited, not only by the express provisions of the Constitution, but also by the commerce clause.

This, although apparently not so recognized at the time, was an important extension of the meaning of the commerce clause. Aside from the prohibition upon taxation of imports and exports, the Constitution, as understood when framed and adopted, imposed no limitations upon the taxing powers of the States.

"The inference from the whole is, that the individual States would under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports."[3]

The great importance of Brown *v.* Maryland is that by that decision this construction was definitely disapproved. The holding of the case is, in substance, that the Federal power derived from the commerce clause, being an exclusive power, and including, as Randolph had said, power "to prevent taxes on imports or exports,"

[1] 9 Wheat. 1. [2] 12 *ibid.* 445. [3] *Federalist*, Nos. 33, 32.

amounted in effect to an original limitation upon State powers.

The new theory of construction, when adopted, may have seemed of small importance, for the tax then in question was in any event unconstitutional. In the case of the State Freight Tax,[1] however, its real importance began to appear. The tax there involved was imposed by a State upon every ton of freight carried within its limits. Such a tax, the State authorities considered, was not strictly a tax upon imports or exports. On the other hand, the burden which it imposed, upon commercial intercourse among the States, was as substantial as it would have been, had it fallen within the precise terms of the constitutional prohibition. The Court said:—

"It would hardly be maintained, we think, that had the State established custom-houses on her borders, wherever a railroad or canal comes to the State line, and demanded at these houses a duty for allowing merchandise to enter or leave the State upon one of those railroads or canals, such an imposition would not have been a regulation of commerce with her sister States. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand."[2]

The tax was held invalid because prohibited by the commerce clause. The Court had, but a short time before this decision, held that the words "exports" and "imports" as used in the Constitution refer only to foreign trade.[3] The clause which was intended to forbid State taxation of interstate as well as foreign trade

[1] 15 Wall. 232. [2] 15 Wall. 276.
[3] Woodruff *v.* Parham, 8 Wall. 123.

having thus been so narrowed as to fail of its full purpose, the commerce clause was broadened so as to take its place, and, thus construed, was applied so as to operate upon interstate carriers not engaged in the coasting trade.[1] The widening of the Federal authority appears also in the reasoning and expressions of the Court in the case of the State Tax on Gross Receipts,[2] although the actual rulings in both cases were consistent with early theories. In the first case a State tax on every ton of freight carried in Pennsylvania was declared unconstitutional, while in the second a tax upon the carrier of a certain sum for every dollar received was upheld, — the difference being that the first tax fell directly upon the shipper, while the second fell but indirectly upon the shipper and directly upon the carrier. So far as the Federal government was concerned the amount which the carrier might charge for transportation was not a subject of regulation. We concede, the Court said, "the right of the owners of artificial highways . . . to exact what they please for the use of their ways." [3]

The subject was one which received great attention at that time both in and out of Congress.[4] When, there-

[1] Something like this construction of the clause is suggested in Dr. James McHenry's "Notes on the Federal Constitution." Under date of Sept. 1, 1787, he says: "Perhaps a power to restrain any State from demanding tribute from citizens of another State" for navigating interstate waters "is comprehended in the power to regulate trade between State and State." See papers contributed by Professor Bernard C. Steiner to *American Historical Review*, April, 1906, Vol. 11, p. 595.

[2] 15 Wall. 232.

[3] 15 Wall. 277.

[4] House Report No. 57, 40th Cong., 2d Sess., June 9, 1868, supporting Federal power to regulate rates, but with a strong minority report. Senate Report No. 462, 42d Cong., 3d Sess., Feb. 20, 1873. A majority of this committee pass over the constitutional question, because in any event opposed to Congressional legislation at that time. A minority reported against

fore, the question of State authority arose again in 1874, the Court repeated its former statement with greater emphasis.

"This unlimited right of the State to charge, or to authorize others to charge, toll, freight, or fare for transportation on its roads, canals and railroads, arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the amount of that compensation. That discretion is a legislative — a sovereign — discretion, and in its very nature is unrestricted and uncontrolled. The security of the public against any abuse of this discretion resides in the responsibility to the public of those who, for the time being, are officially invested with it. In this respect it is like all other legislative power when not controlled by specific constitutional provisions, and the courts cannot presume that it will be exercised detrimentally." [1]

This doctrine was followed without question in 1876.[2] Ten years later this long considered and well established rule was changed. The old doctrine was not abandoned hastily, but because, in the language of Mr. Justice Miller, "it is impossible to see any distinction in its effect upon commerce of either class between a statute which regulates the charges for transportation, and a statute which levies a tax for the benefit of the State upon the same transportation." [3]

The States being thus deprived of the power to regu-

the Federal power. Senate Report No. 307, 43d Cong., 1st Sess., April 24, 1874, — the so-called "Windom Report," in favor of the Federal power, over the dissent of four members of the committee, including Roscoe Conkling. These minority reports deserve special notice because the view thus stated was later approved by the Supreme Court.

[1] R. R. Co. *v.* Maryland (U. S., 1874), 21 Wall. 456, 471.

[2] Peik *v.* Chicago, etc., R. Co., 94 U. S. 164.

[3] Wabash Ry. Co. *v.* Illinois, 118 U. S. 557, 570; reversing People *v.* Wabash Ry. Co., 104 Ill. 476.

late interstate rates, the doctrine has now become current that the Constitution gave this power to Congress. Of course the argument by which the limitation of State jurisdiction was achieved, if good at all, should equally be good as a limitation upon Federal power. Congress is forbidden to tax exports from any State; clearly, then, under the rule applied in the case of the State Freight Tax, like the States, it cannot tax transportation from one State to another, and as, in the phrase employed by Mr. Justice Miller in the case of the Wabash Railway, it is impossible to see a distinction in its effect upon commerce between taxation and regulation of rates, therefore, the conclusion should have been that Congress is constitutionally unable to regulate interstate rates.

The argument was used, however, only against the States. So far as concerns Federal power quite a different argument is used. Congress, it is said, is not expressly given this power, neither is the power expressly denied, and as it no longer exists in the States, it must, so it is said, belong to Congress. Upon this argument, and upon no other, is based the contention of Federal jurisdiction to regulate freight rates.

The method of construction seems an inversion of the principle still taught in the schools, for interpretation of State and Federal constitutions, but the departure, possibly, is less of law, than in the facts of modern transportation. This, however, is clear, — that the Court, under circumstances wholly unforeseen, has sought only to follow constitutional purposes. Its decisions upon this branch of the subject probably go to the limit of Federal power, and extension of present rules would, as

has been shown by Mr. Olney [1] and Mr. Morawetz,[2] be embarrassed by extraordinary constitutional difficulties.

Federal power has also been extended in other directions so as to prevent State legislation, which would interfere with, or burden, interstate transportation or trade, or obstruct navigation of public waters. The important feature about this history is that the power which was originally given to Congress in order to secure "an unrestrained intercourse between the States" [3] has developed, under the decisions of the Supreme Court, subject to the influence of this constitutional purpose only, and with no other end in view. The States have been deprived of power to interfere with the freedom of interstate communication, while on the other hand the nature of the jurisdiction which Congress has acquired over the avenues of interstate trade, does not, in any proper view of the Constitution, authorize it to close those avenues to any person.

It is still true, as Professor Tucker said, that "the whole Constitution, in all of its parts, looks to the security of free trade in persons and goods between the States of the Union, and by this clause prohibits either Congress or the States to interfere with this freedom of intercourse and trade." [4]

[1] "Legal Aspects of Congressional Railroad Rate-Making," *North American Review*, October, 1905.
[2] "The Power of Congress to Regulate Railway Rates," 18 *Harvard Law Review*, 572.
[3] *Federalist*, No. 11.
[4] Tucker, Constitution, Sec. 256.

CHAPTER VI

FEDERAL INCORPORATION

THE differences of opinion which have existed over the Federal power of incorporation have arisen from different conceptions of the nature of a charter.[1] If it be regarded as the legislative organization of an artificial person, in whose favor State laws forbidding perpetuities, accumulations, and combinations in restraint of trade are by the nature of the organization necessarily suspended, the existence of such a dispensing power in the Federal government may well be doubted. Jefferson, Randolph, and many others, on this and other grounds denied the Federal power of incorporation.

On the other hand, if a charter be regarded as of the nature of a partnership agreement involving no public policy, but like a partnership to be judged by its objects, the organization of corporations for Federal purposes bears a very different relation to Federal powers. This was Hamilton's view of a corporation. He said:—

"A strange fallacy seems to have crept into the manner of thinking and reasoning upon the subject. Imagination seems to have been unusually busy concerning it. An incorporation seems to

[1] Among the articles on the general subject may be mentioned, "Federal Control of Corporations," *Yale Law Journal*, Vol. XIV, p. 301, in which Mr. Thomas Thacher argues that the plan proposed by Commissioner Garfield substitutes paternalism for liberty; and "A National Incorporation Law," *Michigan Law Review*, Vol. II, pp. 358, 501, in which Professor Horace L. Wilgus advocates such a law.

have been regarded as some great independent substantive thing; as a political engine, and of peculiar magnitude and moment; whereas, it is truly to be considered as a quality, capacity, or means to an end. Thus a mercantile company is formed, with a certain capital, for the purpose of carrying on a particular branch of business. Here the business to be prosecuted is the end. The association, in order to form the requisite capital, is the primary mean. Suppose that an incorporation were added to this, it would only be to add a new quality to that association; to give it an artificial capacity, by which it would be enabled to prosecute the business with more safety and convenience."

Hamilton, therefore, supported the authority of Congress to create a corporation for any lawful end of the Federal government.

"Thus," he said, "a corporation may not be erected by Congress for superintending the police of the City of Philadelphia, because they are not authorized to regulate the police of that city. But one may be erected in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian tribes; because it is the province of the Federal government to regulate those objects, and because it is incident to a general sovereign or legislative power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage." [1]

The terms in which these opposing views are stated show that the issue concerned, not Federal authority to create an artificial person, but rather the extent of corporate powers to be granted. If wide powers are given, agencies whose operation has been likened to restraint of trade may be put into corporate form, and

[1] Opinion on U. S. Bank Bill. Hamilton's Works (Putnam), Vol. 3, p. 185.

accumulations and perpetuities which nature denies to individuals, and the common law forbids to combinations, may be authorized by charter. On the other hand, if narrow powers be given, and the amount of capital restricted, corporations may be organized so as hardly to be distinguished from partnerships. The question was not, however, thus stated, but was treated as though a question of Federal power to grant any corporate charter whatever.

In this shape the discussion goes back to the formation of the Constitution, and upon the organization of the Federal government was the first constitutional question which became the subject of extended debate.

Federal power to charter banks. It appears that on the 18th of August it was proposed in the Constitutional Convention to give Congress power to grant charters of incorporation in cases where the public good might require them and the authority of a single State might be incompetent; to regulate stages on the post roads; to regulate affairs with the Indians; and to establish institutions for the promotion of agriculture, commerce, trade, and manufactures. On the 14th of September, according to Elliot, Franklin moved that Congress be authorized to provide for cutting canals. Such a power, Wilson said, was necessary to prevent a single State from obstructing the general welfare. These motions were defeated, — the latter, according to Bancroft,[1] on the ground that the expense would be a general burden while the benefit would be local.

[1] "History of the United States," Vol. VI, pp. 360–361.

The vote throws no light upon the purposes of the Convention, and deserves attention only because often mentioned as though indicating that the Constitution as already drawn conveyed the power of incorporation. It is capable of the opposite construction. Nearly forty years afterward, when the vote was discussed in Congress, Senator Cobb, turning to Rufus King, who had been a member of the Convention, asked whether the reason for the defeat of the resolution was that the Convention considered the power already granted. King replied that "such a thing was not thought of." [1]

Between these two opinions of the significance of this vote stand Hamilton, Randolph, and probably Washington himself, for, though he signed the bank bill, he certainly did so on other grounds than this defeated resolution, and is said to have acted with great doubt and hesitation.[2]

Hamilton in his opinion submitted to President Washington Feb. 23, 1791, supporting the bank bill, said of this vote:—

"What was the precise nature or extent of this proposition, or what the reasons for refusing it, is not ascertained by any authentic document, or even by accurate recollection. As far as any such document exists, it specifies only canals. . . . It must be confessed, however, that very different accounts are given of the import of the proposition, and of the motives for rejecting it. Some affirm that it was confined to the opening of canals and obstructions in rivers; others, that it embraced banks; and others, that it

[1] Cong. Deb., Vol. 1, p. 652, Feb. 23, 1825. The tendency now is probably to accept this view as the correct interpretation of the vote. See, for example, House Report No. 2491, 59th Cong., 1st Sess.

[2] Speech of P. B. Porter in House of Representatives, Jan. 18, 1811. Annals 11th Cong., 3d Sess., 627.

extended to the power of incorporating generally. Some, again, allege that it was disagreed to because it was thought improper to vest in Congress a power of erecting corporations. Others, because it was thought unnecessary to specify the power, and inexpedient to furnish an additional topic of objection to the Constitution. In this state of the matter, no inference whatever can be drawn from it."

Randolph's opinion submitted to the President on Feb. 12, 1791, denied Federal power to incorporate a bank, but agreed with Hamilton's opinion of the view which should be taken of proceedings in the Convention. He said:—

"An appeal has been made by the enemies of the bill to what passed in the Federal Convention on the subject. But ought not the Constitution to be decided on the import of its own expressions? What may not be the consequence, if an almost unknown history should govern the construction?"

It may be fair to assume that Randolph and Hamilton would not both have made this argument to the President upon matters within his personal experience as well as within theirs, had they not reason to believe that Washington's recollections were not different from their own.

The question of Federal power to charter a bank, therefore, was not to be decided by reference to any specific grant of power, or to definite construction placed upon the Constitution by its framers, but could be determined only upon consideration of the nature and purposes of the Federal government and of its relations to the States. In this aspect the question was surrounded with difficulties not now fully to be appreciated.

On the one hand, wide distrust of corporations made the States unwilling to part with their powers of control, and on the other hand, the almost impossible disorders of the currency embarrassed every movement of government in collecting revenue, transmitting its funds from one point to another, and exchanging the money received into a medium current at the place of disbursement. There were in 1791 but three banks in the United States, there was no national currency, and the notes which were in existence, part issued by these banks, others by corporations and individuals, were of value only in local circulation.[1]

To facilitate the operation of government under these difficulties the bank bill was passed and approved by the President. Upon these grounds too it was sustained, — not because authorized by any clause of the Constitution, but because the bank was an agent employed by Congress in the discharge of governmental functions.

Throughout this vast republic, Mr. Chief Justice Marshall said in the great case of McCulloch *v.* Maryland, revenue is to be collected and expended. The exigencies of the nation may require that treasure, raised in the North, should be transported to the South, or that raised in the East, conveyed to the West. This may be done by the agency of the bank, and the sole constitutional objection to the adoption of this agency is in the argument that the power to create a corporation is an attribute of sovereignty not expressly conferred on Con-

[1] See McMaster, "History of the People of the United States," Vol. IV, p. 280 *et seq.*

gress. But under the Constitution sovereign powers are divided between the Union and the States. To which then of these two governments does the power to create a corporation for performance of these functions belong? "The power of creating a corporation," he said, "though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished . . . No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them." [1]

Upon this ground then, and upon this ground only, the bank act was sustained, that the corporation thereby created was a direct mode of exercising powers given by the Constitution to Congress. With this decision the question was settled, so far as the Supreme Court can finally set at rest a question of constitutional law. The refusal of the legislative and executive branches of government to accept the reasoning of the Chief Justice, the removal of government deposits by Secretary Taney in President Jackson's administration, and the refusal of Congress to renew the charter, are well known.

It was not until the passage of the national bank act under the pressure of the Civil War, that the country finally accepted the rule of McCulloch *v.* Maryland.

[1] McCulloch *v.* Maryland, 4 Wheat. 316, 408–411.

This statute,[1] entitled "An act to provide a national currency by a pledge of United States bonds, and to provide for the circulation and redemption thereof," was opposed on the ground that incorporation for these purposes was not a direct mode of exercising powers given by the Constitution. This argument was well stated by Senator Garrett Davis of Kentucky. He said: —

"I have always entertained the opinion — at least since the decision of the case of McCulloch *v.* Maryland — that for the purposes of a fiscal agency, Congress had a right to charter a United States bank, but I have doubted the power of Congress to authorize the bank to issue a currency. That it would have the power to give the other functions of a bank to its fiscal agent for the convenience of the collection, custody, disbursement, and transfer of its funds from one point to another, I entertain no doubt; but I seriously distrust the correctness of the position that Congress, under the power 'to coin money and regulate the value thereof,' can resort to any such indirect and irregular power as to authorize its fiscal agent to issue paper to circulate as money; even though it is redeemable in gold and silver; but that Congress have no power to substitute a declared irredeemable paper money as the medium of values . . . I entertain no doubt whatever." [2]

To this Senator Sumner replied that the purpose of the bill was to create "an immense instrument for national credit." Is not national credit, he asked, as much a national instrument as a navy-yard, an arsenal, or a mint? "Where will be your navy-yard, your arsenal, or your mint, if the credit of this country is allowed to fail?" [3]

[1] Act of June 3, 1864, 13 Stat. 99. See, too, Act of Feb. 25, 1863, 12 Stat. 665.

[2] Speech in Senate, May 2, 1864. Cong. Globe, 38th Cong., 1st Sess., Part 3, p. 2020.

[3] Cong. Globe, April 27, 1864, 38th Cong., 1st Sess., Part 2, p. 1894.

Upon the argument thus stated by Senator Sumner, the national banking act was sustained by the Supreme Court.

"It rests on the same principle as the act concerning the second bank of the United States. The reasoning of Secretary Hamilton and of this court in McCulloch *v.* Maryland (4 Wheat. 316) and in Osborne *v.* The Bank of the United States (9 *id.* 708), therefore, applies. The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service."[1]

Organization of trading companies. In the foregoing history of the establishment of Federal power to incorporate governmental agencies, the advocates of a national system for the organization of private mercantile corporations find no assistance. Such corporations are not instruments of public administration, and their incorporation cannot be sustained on grounds which have upheld national banks. To support the proposed legislation some further constitutional ground is needed, such, for example, as seems to be indicated by Hamilton's suggestion, already quoted, that Congress may erect corporations "in relation to the trade between the States," and in relation to foreign trade.[2]

It is significant that shortly before Hamilton expressed this opinion, Madison stated in Congress, that the Federal government was without power to charter manufacturing companies, or companies to cut canals.[3]

[1] Farmers, etc., National Bank *v.* Dearing, 91 U. S. 29, 33.

[2] See, too, James Wilson, "Madison's Journal of Constitutional Convention," Scott's ed., Vol. II, pp. 549, 725; "Doc. Hist. Const. U. S. A.," Vol. III, pp. 555, 744, 745.

[3] Speech in the House of Representatives, Feb. 2, 1791. Annals 1st Cong., Vol. 2, p. 1894–1902.

As to manufacturing corporations the objection is easily understood, for manufacture was not then, and is not now, part of that commerce over which Congress has power of regulation. The canals which were then contemplated, however, were for interstate transportation. If Congress could, in Hamilton's phrase, erect corporations with relation to the trade between the States, would not canal companies be first to fall within Federal power? What is the explanation of this unexpected difference between Hamilton and Madison, joint authors of the *Federalist?*

The answer is in the constitutional meaning of the phrase, to regulate commerce. The Constitution gives Congress entire control over foreign relations. Its power over interstate trade was, on the other hand, a limited power to protect this trade from burdens elsewhere in the Constitution forbidden, such as State taxes on imports and exports. Beyond this, Federal power did not go. Over interstate transportation, not conducted by coastwise navigation, Congress had no power.[1]

Hamilton, then, referred to the organization of corporations for foreign or coastwise navigation[2] or having foreign relations as in the case of the Nicaragua Maritime Canal Co.[3] It would "not be doubted," he said,

[1] *Ante* Ch. III.

[2] See Act of March 3, 1829, incorporating the Washington, Alexandria & Georgetown Steam Packet Co., Cong. Globe, 41st Cong., 2d Sess., Part 1, p. 365. Act of March 25, 1870, 16 Stat. 78, incorporating Washington Mail Steamboat Co., to run a line of steamers between Washington, Norfolk, and other ports, Cong. Globe, 41st Cong., 2d Sess., Part 2, pp. 1037, 1038, Part III, p. 2096. Act of May 4, 1870, 16 Stat. 97, incorporating the Washington & Boston Steamship Co., 41st Cong., 2d Sess., Part 3, p. 2081–2082, Part 4, p. 3085.

[3] See Cong. Rec., 50th Cong., 2d Sess., Vol. XX, p. 87, 25 Stat. 673. Appendix, p. 65 *et seq.* Also speech of William C. Oates in House of Repre-

"that if the United States should make a conquest of any of the territories of its neighbors, it would possess a sovereign jurisdiction over the conquered territory. This would be rather a result from the whole mass of the powers of the Government, and from the nature of political society, than a consequence of either of the powers specially enumerated." [1] Organization of a corporation to exercise over foreign territory a degree of control permitted by another nation affords, therefore, no precedent for the organization of commercial corporations to do business among the States. These charters Congress has refused to grant,[2] and when in 1870 the National Bolivian Navigation Company was incorporated [3] the bill was justified on the ground of Federal power to grant charters for foreign commerce.[4]

The history of the Federal power indicates then that Madison and Hamilton by their expressions on the power of incorporation meant the same thing, — that while Congress could create a corporate agency in foreign relations, or charter navigating companies, nevertheless for operations within the States, Congress had no such power.

sentatives, Dec. 21, 1888. Cong. Rec., Vol. XX, Part I, p. 442 *et seq.* See, too, statutes relating to foreign intercourse by cable; Act of March 29, 1867, 15 Stat. 10; Act of May 5, 1866, 14 Stat. 44; Act of July 25, 1882, 22 Stat. 173; Act of Aug. 8, 1882, 22 Stat. 371.

[1] Opinion on U. S. Bank Bill. See also "Annexation and Universal Suffrage," by Professor John Bach McMaster, *Forum*, December, 1898. "The Status of our New Possessions," by Professor C. C. Langdell, 12 *Harvard Law Review*, 365.

[2] See debate on bill to incorporate Asiatic Commercial Company, 42d Cong., 2d Sess., Part III, p. 3463 *et seq.* House Report No. 2209. Also on bill to incorporate International American Bank, Vol. 31, Cong. Rec., Part 7, p. 6538 *et seq.*, etc.

[3] Act of June 29, 1870, 16 Stat. 168–169.

[4] Cong. Globe, 41st Cong., 2d Sess., Part 6, p. 4846, June 25, 1870; Cong. Globe, 42d Cong., 2d Sess., Part 3, p. 1865, March 21, 1872.

This appears now to be the accepted rule. "Corporations are created by the sovereign, whether the sovereign be the United States or a State. In this regard the power of Congress is limited, while the power of the State is unlimited. Whenever, under the Constitution, Congress can exercise a power, Congress can create a corporation to carry that power into execution, and to the exclusion of the States create corporations in the District of Columbia and all territory of the United States, and in all countries subject to the jurisdiction of the United States. Otherwise, all corporations . . . are created by the States, under the reserve power of the States. At common law all public corporations are subject to the visitorial power of the legislature, and all private corporations are subject to the visitorial power of the courts. Congress has not visitorial power over corporations created by a State." [1]

Incorporation of interstate carriers. Congress has now by an interesting course of decisions acquired a wide jurisdiction over transportation among the States by land,[2] and many expressions are found in decided cases, and in the debates of Congress, indicating that this new authority would enable the Federal government to build an interstate canal,[3] or to charter an interstate railroad. If any such power exist it is of very recent origin.

In the early days of the Constitution, there was no suggestion that Congress could under its powers over

[1] House Report No. 2491, 59th Cong., 1st Sess.

[2] *Ante*, Ch. V.

[3] See remarks of Gaines of Tennessee in debate on bill to incorporate the Lake Erie and Ohio River Canal Co., House of Representatives, Feb. 26, 1906, 59th Cong. Rec., pp. 3070–3078, 3098–3099, 3257.

commerce, establish lines of communication between States. It was argued that this might be done under the power to establish post-roads, but this view did not prevail, and when roads were built the sanction of the States was required.[1] Thus, on Jan. 10, 1803, Maryland passed a law "giving Congress power" to appropriate money for the repair of post-roads within the State, "provided that nothing herein contained shall extend, or be construed to extend, to authorize them to pass a law for the opening of a new road." Throughout the long history of the Cumberland Road, the practice of securing State consent was followed.[2] Even with this legislative consent, the Federal power did not go unquestioned.[3] Without State consent the government was powerless. The Federal government had no authority to remove obstructions either from roads or streams. When Congress met with an obstruction, its remedy was to turn back or to take another road. An instance of this is found in the act of March 26, 1804,[4] enacting:—

Sec. 4. "That whenever it shall be made to appear to the satisfaction of the Postmaster General, that any road established by this or any former act, as a post-road, is obstructed by fences, gates, or bars, other than those lawfully used on turnpike roads, to collect their toll, and not kept in good repair with proper bridges and ferries, where the same may be necessary, it shall be the duty

[1] See Searight *v.* Stokes, 3 How. 151.

[2] See the interesting "Political and Constitutional Study of the Cumberland Road," by Professor Jeremiah Simeon Young, of Lake Forest University, University of Chicago Press, 1904.

[3] See Clay, speeches, Vol. I, p. 69. Von Holst, "Constitutional History," 1750–1815, pp. 389–390. "Statesman's Manual," Vol. I, p. 491.

[4] U. S. Stat., Vol. 2, pp. 275, 277.

of the Postmaster General to report the same to Congress, with such information as can be obtained, to enable Congress to establish some other road, instead of it, in the same main direction."

Sometimes States insisted upon the maintenance of obstructions to routes of interstate travel which were not favored. When Pennsylvania became fearful lest the Susquehanna River should form a highway, whereby the products of that State and of New York should float to a market at Baltimore rather than go to Philadelphia, laws were enacted by the legislature of Pennsylvania forbidding the removal of obstructions to the navigation of the river.[1] For this condition, the Federal government could offer no relief. "Nobody has contended, and I presume that nobody will contend," said Senator Morrill of Maine, in 1866, "that the right of eminent domain exists anywhere except in the States. Nobody ever did contend, and I am sure nobody ever will, that the right to land, the title to real estate, ever vested in the Government of the United States. . . . From the earliest period of this Government down to the present time, never has the General Government undertaken to enter upon the soil of any State to exercise the right of eminent domain in its own right or to take possession of the soil of the several States except by the consent of the States." [2] Land could be acquired then only by negotiation, or by eminent domain when this right was granted by the States. Many statutes of this sort were passed.

[1] Remarks of Senator James A. Bayard of Delaware, February, 1807, Annals 9th Cong., 2d Sess., 56. See also remarks of Senator Martin D. Hardin of Kentucky. Annals 14th Cong., 2d Sess., 171.

[2] Cong. Globe, May 28, 1866, 39th Cong., 1st Sess., p. 2853. See also remarks of Senator Thomas F. Bayard of June 4, 1874. Cong. Rec., Vol. II, Part V, p. 4545.

An illustration is found in the Act of North Carolina of 1813[1] authorizing the United States to obtain sites for light-houses and fortifications by application to the Governor of the State, who thereupon caused proceedings to be instituted in the State courts for condemnation of the needed property, — a method almost diplomatic in character.

In 1875, the Federal power of eminent domain was established.[2] "It is true," said the Court, "that this power of the Federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence," — a doctrine which Mr. Justice Bradley later extended, so that the power in some cases may now be exercised within a State, even over its protest. "In matters of foreign and interstate commerce, there are no States." [3]

When the Pacific Railroads were chartered by Congress, this power did not exist. The roads were chartered as territorial corporations, deriving their authority, in the States within which they operated, by State permission or by operation under State charters.[4]

[1] Laws of 1796–1820, Ch. 857.
[2] Kohl *v.* United States, 91 U. S. 367.
[3] Stockton *v.* Baltimore & N. Y. R. R. Co., 32 Fed. 9.
[4] Among the many statutes relating to these roads, the following may be mentioned: Northern Pacific, organized under the Act of Congress of July 2, 1864, 13 Stat. 365; May 7, 1866, 14 Stat. 355; July 1, 1868, 15 Stat. 255. This road extended into three States, Wisconsin, Minnesota, and Oregon. It was expressly provided by the Act of Congress, that before building, the consent of each and every State should be obtained. These were given as follows: Wisconsin, May 30, 1865, Laws, p. 575; Minnesota, March 2, 1865, p. 228; Oregon, Oct. 28, 1874, p. 101. Union Pacific Ry., organized under Act of Congress of July 1, 1862, 12 Stat. 489; July 2, 1864, 13 Stat. 356; March 3, 1865, 13 Stat. 504. In California this road operated under the charter granted by the State to the Central Pacific Ry. Co., May 1, 1852, Laws, p. 150; see Act of April 25, 1863, repealed by Act of April 4, 1864, p. 344. Nevada gave consent by Act of March 9, 1866. On the eastern end

Since that time Congress has authorized the construction of bridges over navigable waters within State territory, granting the power to acquire by eminent domain the necessary land for supports and approaches,[1] and in one instance has granted a charter of incorporation for these purposes.[2] In these cases Congress may have acted under its wide jurisdiction over navigable waters. Beyond this Federal legislation has not gone.

As far as long established practice can fix the meaning of the Constitution, the extent of, and limitation upon, Federal power to create lines of communication between States are fixed. "It is evident," Gallatin said in his report on internal improvements submitted April 6, 1808, "that the United States cannot, under the Constitution, open any road or canal without the consent of the State through which said road or canal must pass." This was the accepted doctrine for nearly a century, a doctrine which recognized that the primary relations of

the road was to be constructed under the charters of a number of subsidiary State corporations, the Leavenworth, Pawnee & Western R. R. Co. of Kansas; Hannibal & St. Joseph R. R. Co. and Pacific R. R. Co. of Missouri; Union Pacific R. R. Co., Eastern Division, and Burlington & Missouri R. R. Co. of Iowa. Atlantic & Pacific R. R. Co., organized by Act of Congress, July 27, 1866, 14 Stat. 292. California, Act of April 4, 1870, Laws, p. 883. Missouri, Laws of 1869, p. 214, Concurrent Resolution. Texas was at this time under military government. Texas & Pacific R. R. Co., organized by Act of Congress, March 3, 1871, 16 Stat. 573, May 2, 1872, 17 Stat. 59. It was planned to extend this road into two States, California and Texas. These States consented to construction. California by previous general Act of 1852, Laws, Ch. 77, p. 150, and later by Act of March 16, 1874, Laws, p. 370. Texas consented by Act of May 2, 1873, Laws, 318. The Central Pacific Ry. Co. was a State corporation, authorized by the Act of Congress of July 1, 1862, 12 Stat. 489, 494, to construct its line through the territory until it should meet the Union Pacific, which it did at Ogden.

[1] Stockton *v.* Baltimore & N. Y. R. R. Co., 32 Fed. 9.

[2] Luxton *v.* North River Bridge Co., 153 U. S. 525.

the carrier are to the State in which it operates, and that Congress is concerned only in the exercise of one function, and with the carrier because of, and to the extent of this function. In any other aspect the double relations of interstate carriers, to the States on the one hand, and to Congress on the other, is unintelligible. The Texas & Pacific Railway Company, for example, though chartered by Congress as an interstate road with the sanction of the State of Texas, was constructed between points in Texas only. Even advocates of the extension of Federal power do not yet claim that Congress may authorize the building of such a road, and yet in fact the relation which the Texas & Pacific sustains to the State of Texas, is not different from the relation which every carrier sustains to the communities in which it operates. The function of interstate transportation is the same in all the States. Extension of Federal power, then, means the assumption of those direct and primary relations to the carrier itself, outside of and beyond this function, which hitherto have belonged to the States alone.

Incorporation within the territories. Over Federal territories, including the District of Columbia, Congress has jurisdiction in all cases whatever. Under its municipal jurisdiction of this nature, it has organized corporations of every description, but it has never chartered under national powers a mercantile corporation, and when a corporation created in 1866, by statute enacted under local powers but in general terms, attempted to establish its principal office outside the District of

Columbia, its action in this respect was repudiated by Congress.[1]

In the foregoing history is to be found the extent, and the limitations, upon the Federal power of incorporation. The authority to charter mercantile companies to engage in commerce among the States, is a power which was not granted by the Constitution, which Congress has never claimed, and which finds no support in constitutional history. If the general phrases of the Constitution are not thus interpreted "and powers so extensive and important" as the organization of corporations "are derived from them, it would be ridiculous to consider the jurisdiction of Congress restricted." [2]

[1] Act of April 22, 1870, 16 Stat. 93, Cong. Globe, 41st Cong., 2d Sess., p. 1028.

[2] Burwell, in House of Representatives, Jan. 16, 1811. Annals 11th Cong., 3d Sess., 581.

CHAPTER VII

THE ANTI-TRUST ACT

THE Federal Anti-trust Act was formed under influences tending strongly in opposite directions — the desire to afford relief for a condition which seemed to threaten a great public mischief, and the constitutional limitations, which seemed to make effectual Federal legislation upon the subject impossible.

The mischief to be remedied. Many charges are made against great corporations, but the source of the general antagonism, the feature which excites popular apprehension, is their tendency toward monopoly. The danger of this tendency, and the obligation of government to provide a remedy, is stated in emphatic terms.

"Our government springs from and was made for the people — not the people for the Government. To them it owes allegiance; from them it must derive its courage, strength, and wisdom. But while the Government is thus bound to defer to the people, from whom it derives its existence, it should, from the very consideration of its origin, be strong in its power of resistance to the establishment of inequalities. Monopolies, perpetuities, and class legislation are contrary to the genius of free government, and ought not to be allowed. Here there is no room for favored classes nor monopolies; the principle of our Government is that of equal laws and freedom of industry. Wherever monopoly attains a foothold, it is sure to be a source of danger, discord, and trouble." [1]

[1] First Annual Message of President Johnson. As to authorship of this message, see article in 11 *American Historical Review*, 574; *id.* 951.

Most persons, in viewing commercial affairs from the standpoint of complete individualism, would probably agree with Harrington that "equality of estates causes equality of power, and equality of power is the liberty, not only of the commonwealth, but of every man,"[1] or in the briefer phrase, which Algernon Sidney suggests, that equality is part of liberty. A reasonable degree of equality, both of power and of right, seems from such a standpoint to be part of safety, and in this country, until very recent times, has existed. Nature has so limited the life and strength of every individual, that while natural conditions continue, great inequalities are not likely to arise nor long to endure. A man's life ends and in time, under the legal rules which forbid perpetuities and trusts for accumulation, his property is divided.

By the organization of corporations, great institutions are created which are not subject to these laws. A corporation is itself a perpetuity, either by charter or by the facility of renewal. Officers and directors pass, individual stockholdings are divided, but the corporation continues, and its power of acquisition is unrestricted. The laws which formerly secured equal conditions among men are still in force, but that which they forbid is now permitted if effected by other methods. Property may now be held and accumulated indefinitely, if this be accomplished in corporate form.

It is clear that the old laws could not forever continue. The inventions of steam and electricity demand great agencies, and with the growth of centres of population

[1] Oceana (Routledge & Sons), p. 27.

the demand increases for larger, still larger, and cheaper supply. Permanent organizations have become necessary to furnish permanent means of supply on a great scale. Railroads, steamships, factories, mines, must do vastly more and better work than was possible under the old system, and must take advantage of every economy which great organization makes possible. Society has developed beyond the point where its needs can be satisfied by individual exertions, — in other words, beyond the old standards of commercial equality.

Changes, such as these, owe but little to the conscious volition and purpose of the race. They are more like the changes made by great laws of evolution, beyond human control, partly even beyond observation; bringing many ameliorations, but bringing also much which is welcomed by none, limitations upon individual initiative, and personal dependence upon the community in place of personal freedom. The truth of Harrington's remark that equality of estates is the liberty of every man, is now in a qualified sense a matter of common experience, but it means no more than that under present conditions much may be done by combination which individuals could not do at all, or could not do as well. From these fields of industry individuals are excluded, — not by law, or by restraint upon their trade, but by the inefficiency inherent in the method.

Individuals are now, as they have been, equal before the law. Competition is what it has been. There is no relaxation in the rules which forbid restraint of trade. Every person may engage in trade as he desires, and

compete as he can. That his ability is limited only by his capacity, and by the extent of his resources, shows his complete commercial freedom to overcome the competition of those who are weaker, and his danger before those who are stronger. It is mere confusion to define restraints of trade in terms of power, as the inability to compete successfully, or to attempt to apply the law which forbids restraints so as, if possible, to destroy by this provision the inequalities which other provisions create. Society has, for its own needs, created great organizations beyond any individual competition. This is the new feature of present conditions.

For this but one remedy is possible, if indeed it be intended, as has been proposed, that government shall "deal beforehand with causes, not merely afterwards with their effects." [1] Inequality can be cured only by restoring equality, that is, since legislation cannot strengthen the weak, the strong must be reduced, the economies which come from consolidation must be done away with, in short, the amount of property which a corporation may hold must be limited. Such legislation as this, which would measure economic progress by the abilities of the weak, finds few advocates. "The evils of combination," Senator Stewart said, "of course are very great, but the question is, — do they not grow out of civilization itself, the foundation of which is organization?" [2]

For this reason the effort has been made to seek some other point to which legislation may be directed, as has

[1] Annual Report of James R. Garfield, Commissioner of Corporations, Dec. 1, 1905. [2] Cong. Rec., Vol. 21, p. 2566.

been said to draw "the line against misconduct, not against wealth." [1]

It is evident, however, that those who believe monopoly dangerous, do not object to misconduct alone, but to monopoly itself. This objection is not satisfied by laws forbidding over-capitalization, requiring publicity of operation and accounts, or preventing frauds. These are not the evils of monopoly, and are "in no way connected with restriction of competition." [2] The charge against large corporations is that, "by the use of this organized force of wealth . . . the small men engaged in competition . . . are crushed out, and that is the great evil at which all this legislation ought to be directed." [3]

It has been suggested that this could be remedied by laws regulating competition, and forbidding such as has been termed "predatory." An attempt of this nature was made in Rice *v.* Standard Oil Company,[4] where it was sought to found liability upon the assertion that defendants had sold goods to plaintiff's customers at a loss, for the purpose of diverting to themselves trade which had gone to him. The methods of competition are the same, however, whether conducted by small or

[1] President Roosevelt, Message to Congress, 1903, 58th Cong., 2d Sess.

[2] *Ibid.* 1905, 59th Cong., 1st Sess. Cong. Rec., Vol. 40, Part I, p. 92. "Over-capitalization is an evil peculiarly within the control of State governments." Speech of Secretary Root at Utica, Nov. 1, 1906.

[3] Senator George, April 8, 1890, Cong. Rec., Vol. 21, p. 3147: "It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil." Mr. Justice Peckham in United States *v.* Traffic Ass'n, 171 U. S. 505, 571.

[4] 134 Fed. 464.

great.[1] The question is not of methods, but of the power of competition. When a dealer of large means, able to take advantage of economies which a great business makes possible, and having also the further advantage of a wide market, competes with a dealer of small means dependent upon comparatively expensive methods and a limited market, the small competitor reaches the end of its resources first. This cannot be changed by statutes regulating competition.[2]

Trust regulation could be accomplished, then, — if we could return to the conditions of a hundred and fifty years ago, — by abolishing corporations, leaving individuals to the natural laws which check excessive inequalities; or since this is impossible, great inequality may be prevented by limitation upon the amount of property a corporation may hold.

The popular movement for the regulation of corporations has, however, as yet, no well defined end, but seeks at the same time to accomplish inconsistent results; to destroy monopoly without impairing the efficiency of great corporations; to enforce competition, but to forbid its consequences, in substance to ignore the rule, stated by Mr. Brooks Adams, that consolidation is the result alike of competition and of combination.[3]

Legislative history of the statute. The place in this movement at first assigned to the Federal statute

[1] "The Ethics of Trust Competition," by Mr. G. H. Montague, *Atlantic Monthly*, Vol. 95, p. 414, March, 1905.

[2] Mr. Bryan defines a trust as "a corporation that controls so large a proportion of the total product as to be able to effectively defeat competition and fix the terms and conditions of sale." Speech at Madison Square Garden, Aug. 30, 1906.

[3] "Centralization and the Law" (Little, Brown & Co., 1906), Ch. 2.

was necessarily of small importance. Congress was without authority to control or modify State laws under which combinations are formed. Theories of constitutional construction had not yet developed, whereby, leaving these laws in full operation, an antagonism has been erected between State and Federal laws, empowering Federal officers laboriously to destroy organizations which the States lawfully authorize.

When the Sherman Act was before Congress the rule was undoubted that each State governed the corporations formed under its laws, determining the amount of capitalization which should be permitted, the powers which might be exercised, and fixing the terms for admission of corporations formed elsewhere. In all cases the contracts to be made were matters with which Congress had no concern save to the extent that, under the commerce clause, the Constitution established free trade among the States.

The explanation is, that during the first century after the adoption of the Constitution, Federal powers over commerce, except in relation to carriers, had not greatly enlarged. When the Sherman Act was debated in 1890 the commerce clause still retained something of the meaning with which it was drawn, and Congress in framing its statute manifested no desire to go beyond that meaning. "I believe," said Senator Edmunds, "that the safety of the Republic as a nation, one people, one hope, one destiny, depends more largely upon the preservation of what are called the rights of the States, than upon any other one thing." [1]

[1] Speech in Senate, March 27, 1890, Cong. Rec., Vol. 21, p. 2727.

Federal regulation of corporations then, at a time when Congress, having no constitutional power over the subject, had no desire to pass beyond constitutional limitations, presented a difficult situation for advocates of centralization.

It is very clear, Senator Sherman said, that Congress has no power to control commercial combinations unless it be derived, not from the power to regulate commerce, but from the power to levy taxes.[1] This power, he said, Congress may exercise in its own discretion, both as to the objects and rates of taxation. "Some . . . taxes are levied for the direct and some for the incidental encouragement and increase of home industries. The people pay high taxes on the foreign article to induce competition at home, in the hope that the price may be reduced by competition, and with the benefit of diversifying our industries and increasing the common wealth. Suppose one of these combinations should unite all, or nearly all, the domestic producers of an article of prime necessity with a view to prevent competition and to keep the price up to the foreign cost and duty added, would not this be in restraint of trade and commerce and affect injuriously the operation of our revenue laws?" [2]

In accordance with these views, in 1888 and again in 1889, Senator Sherman introduced a bill to forbid combinations tending to prevent competition in the importation of articles from abroad, or in the production of domestic articles competing with imported articles. Congress, he said, "can go no farther than that. It is

[1] Cong. Rec., Vol. 19, p. 7513. [2] *Ibid.* Vol. 21, p. 2462.

not claimed by anybody it can. So that covers the whole thing." [1]

It soon became apparent, however, that the revenue power afforded no support for a bill which assumed complete jurisdiction over the commercial competition of the country. "If Congress could exercise such a power as this," Senator George said, "nothing would remain to the States of their ancient and undoubted jurisdiction over their internal affairs." [2] "I do not think the courts would give effect to such a provision," Senator Reagan said, "nor do I think it would be safe for the Senate to attempt to do what it appears to me is clearly not within the power of Congress." [3]

The attempt to support the bill as an exercise of the revenue power, was therefore abandoned by common consent, and it was left to stand, if at all, as an exercise of the power to regulate commerce, — a basis of jurisdiction which had already been considered, and passed over, as inadequate to support any effective Federal legislation.

In this aspect it was necessary to restrict the operation of the bill to agreements and combinations forming part of interstate or international commerce, — that is, for example, to agreements for interstate transportation, or to contracts for the sale and delivery of goods across State lines. Few combinations relate to these contracts, however, and therefore, in the effort to make the statute broad enough to be effective, it was proposed to forbid combinations in restraint of competition in the produc-

[1] Cong. Rec., Vol. 20, p. 1167.
[2] *Ibid.* Vol. 21, p. 1770.
[3] *Ibid.* Vol. 20, p. 1169.

tion, manufacture, or sale of goods, "that in due course of trade shall be transported from one State" to another. A statute of this nature could be sustained only on the ground of an anticipating and continuing jurisdiction over every article, which at any period in its history — from production commenced to consumption completed — had ever crossed, or would cross, State lines, and over every buyer and every seller of such article. No jurisdiction of this sort exists. The agreements which the bill forbade were within the ordinary State jurisdiction. These, it was proposed to subject to Federal control by reason of an act which might or might not take place, but if at all, would be done after the agreement had been made.

"The trouble about this bill," Senator George said, "is that it is an attempt to do the impossible. It is an attempt to draw within the commercial power of Congress jurisdiction over this subject by the provision about transportation. This is the trouble." [1]

No attempt was made to answer these objections and as Senator Morgan said, the bill "went to pieces." [2]

Following this argument the bill was redrafted and a new theory of Federal jurisdiction was proposed. As now advanced, the bill forbade combinations or arrangements tending to prevent free competition between citizens of different States, or of the United States and a foreign country. The fact, said Senator Platt of Connecticut, that the bill is confined to arrangements between persons or corporations of different citizenship, "is an admission on the face of it, that the author

[1] Cong. Rec., Vol. 21, p. 1460. [2] *Ibid.* p. 2608.

of the bill . . . admits his inability to do anything else in this direction." [1]

The new source of authority was defended by Senator Sherman on the ground that the Constitution has not only given to the Federal courts jurisdiction of certain cases arising under its provisions, but has also given to those courts a broad jurisdiction dependent upon citizenship. "This jurisdiction embraces the whole field of the common law and of commercial law, especially of the law of contracts, in all cases where the United States is a party, and in all cases between citizens of different States. The jurisdiction is as broad as the earth, except only it does not extend to controversies within a State between citizens of a State. All the combinations at which this bill aims, are combinations embracing persons and corporations of different States." [2]

This, as Senator Vest showed, is but to confuse the jurisdiction of the courts with the legislative jurisdiction of Congress. Federal courts enforce State law in fields beyond congressional control.[3]

"I suppose," Senator Hoar said, that the provision confining the operation of the bill to combinations between citizens of different States, "was prepared with some idea . . . that contracts between citizens of . . . different States were necessarily commerce between those States, and that that was essential to bring the proposed statute within the constitutional power of Congress. . . . But that, as it seems to me, is very clearly a mistake. It is not commerce between the States for a citizen of Massachusetts to go into Ohio and buy a farm there, or buy a barrel of flour there, or make an unlawful contract there. The bill must stand, if at all,

[1] Cong. Rec., Vol. 21, p. 2607.
[2] *Ibid.* p. 2460.
[3] *Ibid.* pp. 2464–2466.

upon the fact that it is a bill to protect what is described alone, and that is the importation, transportation and sale of articles imported into the United States or transported from one State to another. . . ." [1]

In accordance with these views the clause relating to diversity of citizenship was stricken out, and the bill once more rested upon the narrow power to regulate commerce.

As thus framed, the extent of its operation was defined in the course of the debates. "Suppose," Senator Platt of Connecticut asked, "that there was a combination existing in Chicago to put up the price of wheat. . . ." Could that combination "be reached under the power of Congress to deal with commerce between the States?" To which Senator Hoar answered, that unless it can be shown that the combination is made to affect the price to be paid for delivery in another State, the combination is beyond Federal power. It is difficult, then, said Senator Platt, to see that anything could be reached.[2]

The statute, in other words, standing alone, was as the Judiciary Committee of the House reported "of little value." [3] It could be effective only in supplementing State laws, — in preventing the evasion of State statutes by the insertion in contracts otherwise unlawful, of provisions for interstate delivery.[4] The attempt to draw commercial combinations within Federal power "by the provision about transportation"

[1] Cong. Rec., Vol. 21, p. 2567. [2] *Ibid.* p. 2568.
[3] House Report No. 1707, 51st Cong., 1st Sess., April 25, 1890.
[4] See, for example, Hadley Dean Plate Glass Co. *v.* Highland Glass Co., 143 Fed. 242.

was abandoned and the general subject was left to the States.[1]

The line between State and Federal authority. The nature and extent of Federal powers over commerce among the States, has been defined in many cases. As has been shown in previous chapters, the jurisdiction has been enlarged, partly by application of old rules to new conditions, partly by mistaken conceptions of early decisions, and partly by necessity, as in the adoption by the decision of Crandall *v.* Nevada [2] of new relations among the States which the Civil War established. Notwithstanding this development, there has, since the

[1] "I should be very glad if there were some way by which the evils aimed at . . . could be effectually remedied. . . . But . . . I am compelled to recognize the fact that there are many things . . . which the Government of the United States, as a government of limited and special powers, is not competent to accomplish. I do not think it wise statesmanship that we should burn the house in order to get rid of the rats, nor that we should overthrow our constitutional form of government in order to get rid of some of the evils of society. We are not altogether without remedy. The States have the power to deal . . . with all phases of" the subject. Speech of Senator Gray, March 26, 1890, Cong. Rec., Vol. 21, p. 2657. The House Committee on Judiciary reported on the bill April 25, 1890. Among other things it said: —

"It will be observed that the provisions of the bill are carefully confined to such subjects of legislation as are clearly within the legislative authority of Congress.

"No attempt is made to invade the legislative authority of the several States, or even to occupy doubtful grounds. No system of law can be devised by Congress alone which would effectually protect the people of the United States against the evils and oppression of trusts and monopolies. Congress has no authority to deal, generally, with the subject within the States, and the States have no authority to legislate in respect of commerce between the several States or with foreign nations.

"It follows, therefore, that the legislative authority of Congress, and that of the several States must be exerted to secure the suppression of restraints upon trade and monopolies.

"Whatever legislation Congress may enact on this subject, within the limits of its authority, will prove of little value, unless the States shall supplement it by such auxiliary and proper legislation as may be within their legislative authority."

House Report No. 1707, 51st Cong., 1st Sess.

[2] 6 Wall. 35.

Civil War, been a substantial agreement upon the general definition of the Federal jurisdiction.

Interstate commerce, in the constitutional sense, is characterized by transportation which extends beyond the limits of a single State. It consists in the embarkation, transportation and discharge of passengers, the receipt, carriage and delivery of goods, and in negotiations looking toward, or constituting, contracts having relation to such transportation; that is, contracts by the seller to deliver goods in another State, or contracts for the sale of goods after transportation while still in first hands and original packages.

The Federal jurisdiction, founded, as it is, upon transportation across State lines, is necessarily narrow. It is not a jurisdiction over persons engaged in commerce, but over that commerce which falls within the constitutional definition. The power of Congress is founded upon the fact of interstate transportation, or negotiation for interstate transportation; it exists whenever this fact exists, and only then. It is jurisdiction over an act, and no matter how often an individual may perform the act, it never becomes a personal jurisdiction, but at the most amounts to control of frequently repeated acts.

The fact then that persons associated as partners, or as members of a corporation, within a State may ship goods across State lines does not bring within Federal jurisdiction the articles of co-partnership or of incorporation, but only the acts which directly and immediately centre about interstate transportation. The fact that goods may ultimately go across State lines, or even that they are produced and marketed with this destination

in view, does not bring them within control of Congress. "A pretension as far reaching as this, would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations, the results of which may not become the subjects of foreign commerce and be borne either by turnpikes, canals or railroads, from point to point within the several States, towards an ultimate destination, like the one above mentioned." [1]

With reference to goods, the commerce which is within Federal control, begins with the actual movement from State to State, or with delivery to the carrier for transportation. It ends, when the goods are merged in the general mass of property in the State of destination, a merger, it has been determined, which for practical purposes is effected when the goods pass from first hands, or when, without sale, the original package is broken. With reference to persons participating in these operations, commerce begins with the commencement of negotiations for sale or transportation and ends with performance. Federal power extends also to protect goods and persons from discrimination on account of foreign origin, and includes a broad control over the coasting trade. The extent of Federal jurisdiction varies somewhat, according to the nature of the power under discussion. To take a familiar instance, the regulations of a carrier may permit

[1] Veazie *v.* Moore, 14 How. 574; Kidd *v.* Pearson, 128 U. S. 1.

goods, which have been received for through transportation, to be halted within a State for local purposes,— as in the case of grain which is milled in transit. In this case the grain being within the State for other purposes than transportation, is subject to State taxation, although so far as concerns the carriers' rates for transportation from point of origin to ultimate destination, the Federal jurisdiction is uninterrupted. So the line which marks the extent of Federal power under the Anti-trust Act, may not at all points be identical with the line which separates State and Federal authority in cases of taxation and regulation of rates, but the principle upon which the distinction rests is in all cases the same, — that Federal power relates to interstate transportation, and is limited to such regulations as will prevent burdens upon the act of communication. Within these limits the whole Federal power is contained.

It is obvious, then, that the line between State and Federal powers with reference to commerce is an arbitrary one. There is no economic or commercial distinction which even roughly corresponds with State boundaries. Commerce is a whole, and a power to regulate commerce, if complete and unlimited by an arbitrary line of division, must extend to all commerce wherever conducted. Such a power Congress does not possess. The Constitution in fact established an arbitrary limit to Federal jurisdiction.

A distinction of this nature, however, clear as it may at first be made, is difficult to observe. Courts proceed so largely by logical processes, seeking to create a consistent and harmonious body of decisions,

that an arbitrary distinction, undiscoverable by logic, inevitably tends to blur.

In the history of Federal decisions upon the commerce clause, and conspicuously in cases arising upon the Sherman Act, this tendency shows itself with increasing force and with a twofold effect; limiting State powers so as seriously to interfere with the legislation which most effectively can remedy commercial evils, and imposing upon the Constitution new interpretations which threaten fundamental alteration in our system of government.

It is of great importance, then, that State jurisdiction over corporations should be understood; that it should be known that there is no practical necessity which compels Congress and the courts to supersede this jurisdiction, but on the contrary that, so far as concerns constitutional law, the practical difficulties in the way of corporate control result from recent efforts to limit State authority; of greatest importance is it, that constitutional government and the reign of law should be maintained, and that the great tribunal, which has been called the living voice of the Constitution, should not become a dependent upon the popular opinion of the day.

That State jurisdiction is adequate to reach the commercial conditions from which has arisen the current demand for trust legislation, is shown by the fact that these conditions have been brought about by recent modification of State laws.

When the Constitution was adopted, "it was accepted as a matter of course that the several

States were the proper authorities to regulate, so far as was then necessary, the comparatively insignificant and strictly localized corporate bodies of the day." [1]

In this well-known history appears a limitation which in early days restricted the size of corporations. Corporate bodies at that time were "strictly localized"; that is, they conducted their business in the State of incorporation. Under this practice no great monopoly can arise, for its two essential conditions are absent.

A great market makes a great business, and State laws permit great aggregations of capital. Both conditions must unite to make a great corporation possible, and both are within the power of each State to control for itself. Inequality among competitors may be limited directly, by restricting the amount of property which a corporation may hold, or the limitation may be imposed indirectly, by restricting the market in which a corporation may deal. Any State which so desires may establish its conditions of competition by requiring all who conduct business in corporate form within its territory to organize under its laws; forbidding its corporations to hold stock in other companies, and forbidding foreign companies to acquire title to stock of its corporations. An individual could then control as many State corporations as his means permitted; but this monopoly, were one so created, would not be permanent, and in time the holdings so united would be divided.

The Federal Constitution does not prevent State

[1] President Roosevelt, Message to Congress, 1901, 57th Cong., 1st Sess.

legislation of this character, nor interfere effectually with its operation. A corporation cannot maintain a monopoly throughout the country by dealing only in original packages.

The limitation upon the size of corporations, which thus resulted from State control, seems to have been understood when the Constitution was formed. In opposing a grant to Congress of power to create corporations James Winthrop said: —

"We find hardly a country in Europe which has not felt the ill effects of such a power. Holland has carried the exercise of it further than any other country and the reason why that country has felt less evil from it is that the territory is very small." [1]

The size of the market, in other words, determined the size of competitors. These conditions existed also in America for many years after the adoption of the Constitution. The territory of each State was small, and the State corporations to a considerable degree confined to that territory.

All this has but recently been altered by the changes in State law which permit incorporation for unlimited amounts, which have abolished the rules forbidding corporate ownership of stock, and by the comity under which every State has admitted the corporations of every other State and country. If it be desired to undo these changes, they can be abolished as they were made, — by each State for itself. In the meanwhile the domestic policy of each State, toward its own and foreign cor-

[1] *Massachusetts Gazette*, Dec. 14, 1787, Ford, Essays on the Constitution, p. 70.

porations, is in any event beyond Federal jurisdiction. We are informed that "it is difficult to be patient with an argument that such matters should be left to the States," [1] but this is beyond question the constitutional rule,[2] and in its favor it may be said that under the liberal practice of the States, commercial prosperity for all classes has reached its highest point.

In fact, limitation upon the size of corporations is undesirable, — both because it amounts to no more than the substitution of many local monopolies for national monopolies, without the advantages which come from consolidation, and because, notwithstanding the force of theoretical arguments concerning equality, it is evident that only by great corporations can great business be done. America is competing for the markets of the world, and the size of the market determines the size of the competitors. "The same business conditions which have produced the great aggregations of corporate and individual wealth have made them very potent factors in international commercial competition. Business concerns which have the largest means at their disposal, and are managed by the ablest men, are naturally those which take the lead in the strife for commercial supremacy among the nations of the world. America has only just begun to assume that commanding position in the international business world, which we believe will more and more be hers. It is of the utmost importance that this position be not jeoparded, especially at a time when the overflowing

[1] President Roosevelt, Message to Congress, 1904, 58th Cong., 3d Sess.
[2] President Roosevelt, Message to Congress, 1901, 57th Cong., 1st Sess.

abundance of our own natural resources and the skill, business energy, and mechanical aptitude of our people make foreign markets essential." [1]

The Federal statute, then, being enacted in a field which the States alone adequately could cover, could be of value only in supplementing State laws. The organization and administration of corporations and partnerships; the operations of production and the control of domestic commerce and domestic markets, — all these matters belong to the States. When goods pass from the domestic market, the contracts which centre about transportation, as this expression has been defined, belong to Federal control, and to these contracts alone the Federal statute relates.

The combinations over which Federal power extends are, in other words, of the following classes: —

1. Combinations relating to the act of transportation across State lines.
2. Combinations relating to the purchase or sale of goods under contracts providing for delivery across State lines.
3. Combinations relating to the purchase or sale of goods which have been transported across State lines and are held in first hands and original packages.

Other combinations of the nature of one of these three classes, such, for example, as a conspiracy to destroy or injure imported goods, or to deny public access to the place of sale, would also be within Federal authority. Broadly speaking, however, these three classes define the field of Federal jurisdiction.

[1] President Roosevelt, Message to Congress, 1901, 57th Cong., 1st Sess.

Within this field the Federal statute enacts: —

1. That every contract or combination in restraint of trade or commerce among the States, &c., is illegal and that the parties to such a contract are guilty of a misdemeanor. (First section.)
2. That every person who shall monopolize or attempt to monopolize any part of interstate or foreign trade is guilty of a misdemeanor. (Second section.)[1]
3. That violation of the act may be prevented and restrained by proceedings in equity under the direction of the Attorney-General.
4. That any property owned under any contract or by any combination or pursuant to any conspiracy mentioned in the first section "and being in the course of transportation from one State to another, or to a foreign country" shall be forfeited.
5. That persons injured in business or property by acts in violation of the statute may sue and recover threefold damages and an attorney's fee.

The statute was framed in terms which were well known in the language of the common law and had a settled legal significance. Its operation was confined to a jurisdiction whose limits were fixed by the Con-

[1] The first two sections of the statute read as follows: —

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

See U. S. Stats., Vol. 26, p. 209.

stitution and defined by numerous decisions. There seemed to be little room for doubt as to its meaning, or for speculation as to its effect.

At common law, as understood when the Federal statute was passed, the term "contract or combination in restraint of trade" referred to undertakings, whereby a person bound himself to refrain from the exercise of a trade or occupation. Restrictions of this nature are common in articles of copartnership, where such a stipulation may be necessary to secure the entire effort of each partner in the common enterprise. So in selling a business and good-will, a stipulation by the seller not to compete with the buyer is generally necessary in order to deliver the custom which the buyer seeks to acquire. In these and in other cases of similar character the contract to refrain from competition, when reasonable, not wider than necessary to accomplish the main purpose of a lawful contract, and not tending toward monopoly, will be supported.

There has been some doubt whether an agreement whose principal purpose was restriction of competition could under any circumstances be sustained. The decisions were considered at length by the Circuit Court of Appeals in the Addyston case,[1] with the conclusion that the weight of authority was opposed to such contracts. Upon what ground, it was asked, can courts in the absence of legislation determine how much restraint of competition is in the public interest and how much is not.

In many cases the establishment of a standard is

[1] United States *v.* Addyston Pipe & Steel Co., 85 Fed. 271, aff. 175 U. S. 211.

wholly beyond the judicial function. There may, however, be extreme cases which would warrant judicial interference. When, for example, railroad rates are fixed by State authority, the Federal courts, although without power to pass upon the question of reasonableness, have often enjoined the enforcement of rates which were so low as to amount to confiscation. If competition be so keen as, in the absence of some understanding, to bring ruin to competitors, should not a reasonable agreement to prevent such excesses be supported? Some cases support this view, which may now have the support of a majority of the members of the Supreme Court.[1]

This, then, is the meaning of the Federal statute.

The first section described two classes of cases, contracts in restraint of trade and combinations or conspiracies in restraint of trade,[2] although in the second of these classes a difference may possibly be recognized between a combination and a conspiracy.[3]

The second section of the act is not as clear as the first section. It probably limits the restrictions which, at common law and under the first section, would be considered reasonable, by forbidding in any event such contracts as in the common law phrase would "tend toward monopoly."[4]

[1] See opinion of White, Field, Gray, and Shiras, JJ., in United States *v.* Freight Association, 166 U. S. 290, 343; United States *v.* Joint Traffic Association, 171 U. S. 505; opinion of Mr. Justice Brewer in Northern Securities Co. *v.* United States, 193 U. S. 197, 360.

[2] Opinion of Mr. Justice Holmes, in Northern Securities Co. *v.* United States, 193 U. S. 197, 400; Rice *v.* Standard Oil Co., 134 Fed. 464, 466.

[3] United States *v.* Debs, 64 Fed. 724, 748.

[4] "All that is added to the first section by section 2 is that like penalties are imposed upon every single person who, without combination, monopolizes or attempts to monopolize commerce among the States; and that the liability

The statute as a whole is clear in what it does not do, and substantially clear in what it does.

With the conditions which cause inequality in commercial competition, and with corporations and partnerships formed under State law, it does not attempt to deal, and when it was urged upon the Supreme Court that a literal following of the statute would include such combinations, it was answered that "the formation of corporations for business or manufacturing purposes, has never to our knowledge been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership." [1]

That which the statute effected was no more than the introduction of the rule of the common law into the field of Federal jurisdiction over commerce.

"We are dealing," said Senator Hoar, "with an offence against interstate or international commerce . . . and we find the United States without any common law. The great thing that this bill does, except affording a

is extended to attempting to monopolize any part of such trade or commerce. It is more important as an aid to the construction of section 1 than it is on its own account. It shows that whatever is criminal when done by way of combination is equally criminal if done by a single man. That I am right in my interpretation of the words of section 1 is shown by the words 'in the form of trust or otherwise.' The prohibition was suggested by the trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business, and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared. Further proof is to be found in section 7, giving an action to any person injured in his business or property by the forbidden contract. This cannot refer to the parties to the agreement and plainly means that outsiders who are injured in their attempt to compete with a trust or other similar combination may recover for it. . . . How effective the section may be or how far it goes, is not material to my point." Mr. Justice Holmes, in Northern Securities Co. *v.* United States, 193 U. S. 197, 404–405.

[1] United States *v.* Joint Traffic Association, 171 U. S. 505, 567.

remedy, is to extend the common law principles which protected fair competition in trade in old times in England, to international and interstate commerce in the United States."[1] The Sherman Act was, then, the adoption by Congress of the policy of the common law to the full extent of Federal jurisdiction, and both the common law on the subject and the extent of Federal power were well defined and understood. Moreover, the statute being criminal in character,[2] it was said must be strictly construed.[3] A court should not "subject persons to the penalties thereby imposed unless the contract complained of is one that is clearly within the provisions of the statute."[4]

With the conception of Federal jurisdiction so long accepted, and with the meaning of the statute adopted by all departments of government, administrative officers, during the last few years, have not been content. This is the conspicuous feature of present administration of the Sherman Act. The Constitution is unaltered. The position of the Supreme Court has not changed, but the policy of government, nevertheless, has been directed to extend Federal jurisdiction, to impose new meanings upon the statute, and to make

[1] Speech in Senate, April 8, 1890, Cong. Rec., Vol. 21, p. 3152.

[2] "The Northern Securities Case and the Sherman Anti-trust Act," by Professor C. C. Langdell, 16 *Harvard Law Review*, 539. "The Revival of Criminal Equity," by Mr. Edwin S. Mack, *id.* 389. Opinion of Mr. Justice Holmes in Northern Securities Co. *v.* United States, 93 U. S. 197, 400. United States *v.* Joint Traffic Ass'n, 76 Fed. 895, 898. United States *v.* Trans-Missouri Freight Ass'n, 58 Fed. 58, 77. "The conduct forbidden by the bill is an injury to the public, but there is no injury to the United States as a government, in respect of any of its property, or ownership, or function." Senator Hoar, March 24, 1890, Cong. Rec., Vol. 21, p. 2567.

[3] Greer Mills & Co. *v.* Stoller, 77 Fed. 1, 3.

[4] United States *v.* Freight Ass'n, 58 Fed. 58, 77.

Federal courts the instrument to establish this new body of law.

"For a law which affected such tremendous interests," Secretary Taft recently said, "its language was not full of useful detail in the description of the offences which were denounced. It would seem as if Congress itself knew that the evil existed, but had a most indefinite idea of how it was to be described, and the matter was apparently turned over to the courts, as cases arose, and decisions were invoked, to work out the exact character of the offences denounced, and the limitations which were to be introduced into the statute, in order that the interpretation of it might accord with what was practicable and reasonable. Construed literally, this statute could be used to punish combinations of the most useful character, like partnerships and other business arrangements, conceded by all to be legitimate and proper, and the difficulty in its construction has been to draw a line effective to suppress the real evil aimed at by the legislature, and to furnish a proper and clear rule for the guidance of business men, while not interfering with legitimate combinations which Congress had no purpose to prevent." [1]

In this statement Secretary Taft does not pretend to give the views of the Supreme Court, for that Court has made no decisions which would bear this construction. There can be no doubt, however, that the Secretary correctly stated the present policy of government, and even the position of some inferior courts.

How has this remarkable change been effected? How does it come that a statute, well understood when it was passed, is now an "indefinite idea" turned over to the courts for definition? How can the courts accept this function or "work out the exact character of the offences

[1] William H. Taft, Speech at Bath, Me., Sept. 5, 1906.

denounced, and the limitations . . . to be introduced into the statute" except by the exercise of power which belongs to Congress only? Upon what ground are partnerships and corporations now included in the literal construction of a statute from which they were excluded when the act was passed, and if included, how is the judiciary to draw a line which shall permit some, suppressing others, so as "to furnish a proper and clear rule for the guidance of business men"?

Long ago Judge Taft remarked that "there are some cases in which the courts . . . have set sail on a sea of doubt, and have assumed the power to say . . . how much restraint of competition is in the public interest, and how much is not." Of such decisions, he observed that "the manifest danger in the administration of justice according to so shifting, vague and indeterminate a standard would seem to be a strong reason against adopting it." [1]

Other observers have more emphatically stated the nature of this manifest danger. Judge Cooley said that "a marked difference exists between the employments of judicial and legislative tribunals . . . . The law is applied by one, and made by the other. To do the first, therefore, — to compare the claims of parties with the law of the land before established, — is in its nature a judicial act. But to do the last — to pass new rules for the regulation of new controversies — is in its nature a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future, they violate the definition of a law as a 'rule of civil

[1] United States *v.* Addyston, &c., Co., 85 Fed. 271, 284.

conduct'; because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated." [1]

Mr. Justice Story said that were the judicial powers "joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges whose decisions would then be regulated only by their opinions, and not by any fundamental principles of law." [2] This "may justly be pronounced the very definition of tyranny." [3]

Judicial History of the Statute. In the courts, decisions upon the statute fall naturally into two classes, — those which construe the act itself, and those which consider the field for its constitutional operation.

Construction. Collateral contracts. The statute forbids only those contracts which directly affect interstate commerce. That complainant is a member of a combination in violation of the act does not excuse infringement of a patent [4] or a copyright,[5] nor is it a defence to an action for infringement of a trade-mark that complainant had acquired and used the mark in violation of the statute.[6] One purchasing from an illegal combination cannot refuse to accept the goods [7] or resist an action for the price, either on the ground that

[1] Cooley Const. Lim., pp. 133–134 (7th ed.).
[2] Commentaries on the Constitution (5th ed.), Sec. 522.
[3] *Federalist*, No. 47.
[4] General Electric Co. *v.* Wise, 119 Fed. 922; Bement *v.* Harrow Co., 186 U. S. 70. Compare Rubber Tire Wheel Co. *v.* Milwaukee Rubber Works Co., 142 Fed. 531; Indiana Manufacturing Co. *v.* Threshing Machine Co. 148 Fed. 21.
[5] Scribner *v.* Straus, 130 Fed. 389.
[6] Independent Baking Powder Co. *v.* Boorman, 130 Fed. 726.
[7] Hadley Dean Plate Glass Co. *v.* Highland Glass Co., 143 Fed. 242.

the combination was illegal, or the price beyond what it would have been under free competition.[1] The remedy given to individuals injured through violation of the statute is in an action for damages under the seventh section.[2] In one case an injunction sought by a railroad company to prevent sales of passage tickets by unauthorized persons, was denied on the ground that complainant was a member of an illegal association,[3] but in a similar case in a State court it was held that the contract contained in the ticket is collateral and that such an injunction should be granted.[4] One who requests and accepts services must pay the agreed price, although those who render the service may have formed an association in violation of the act.[5] Securities in the hands of innocent purchasers for value, are not invalid because their enforcement may aid a violation of the anti-trust law,[6] nor is a violation of the law by complainant a defence to a bill to foreclose a mortgage,[7] nor to any contract not directly related to the unlawful purpose.[8]

Construction. Injunctions. The statute gives to individuals no new right to relief in equity, and authorizes

[1] Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540; Dennehy *v.* McNulta, 86 Fed. 825. See Chicago Wall Paper Mills *v.* General Paper Co., 147 Fed. 491. Compare, however, Continental Wall Paper Co. *v.* Lewis Voight & Sons Co., U. S. Cir. Ct. of Appeals, 6th Circuit, Dec. 4, 1906.

[2] Atlanta *v.* Chattanooga Foundry Co., 101 Fed. 900; 127 Fed. 23; Chattanooga, &c., Works *v.* City of Atlanta, decided by U. S. Supreme Court, Dec. 3, 1906.

[3] Delaware, L. & W. R. R. Co. *v.* Frank, 110 Fed. 689.

[4] Kinner *v.* Lake Shore, &c., R. R. Co., 23 Ohio Circuit Ct. Rep. 294.

[5] The Charles E. Wisewall, 74 Fed. 802; 86 Fed. 671; approved in 184 U. S. 540.

[6] Ingraham *v.* National Salt Co., 130 Fed. 676.

[7] Dikerman *v.* Northern Trust Co., 176 U. S. 181.

[8] Harrison *v.* Glucose, &c., Refining Co., 116 Fed. 304.

issuance of injunctions only in suits brought by the United States.[1] Combinations in restraint of interstate commerce are however made unlawful; and where such a combination threatens irreparable injury under circumstances which, upon general principles of equity authorize the relief, an injunction will be granted.[2] A court cannot by virtue of this statute grant a mandatory injunction by which persons will, in effect, be compelled to enter into contracts. A railroad company may make an exclusive contract for through billing and rating,[3] and a court cannot in order to prevent discrimination compel similar contracts with other carriers.[4]

Application of the statute to railroads. In a number of early cases the act was applied to combinations of laborers to interrupt free passage from State to State, the defendants in most instances being railroad employees.[5] At this point in the process of judicial construction the case of the Freight Association [6] presented to the Supreme Court the question whether the act applied to interstate carriers.

Of the intention of Congress there is probably little

[1] Blindell *v.* Hagan, 54 Fed. 40; Hagan *v.* Blindell, 56 Fed. 696; Pidcock *v.* Harrington, 64 Fed. 821; Greer *v.* Stoller, 77 Fed. 1; Post *v.* Southern Ry. Co. (Tenn.), 52 S. W. 301; Southern Indiana Express Co. *v.* United States Express Co., 88 Fed. 659.

[2] Blindell *v.* Hagan, 54 Fed. 40; 56 *id.* 696; Gulf, &c., Ry. Co. *v.* Miami S. S. Co., 86 Fed. 407; Conf. Shelton *v.* Platt, 139 U. S. 591.

[3] St. Louis Drayage Co. *v.* Louisville & N. R. R. Co., 65 Fed. 39; Prescott, &c., R. R. Co. *v.* Atchison, &c., R. R. Co., 73 Fed. 438; 84 Fed. 213.

[4] Gulf, &c., R. R. Co. *v.* Miami S. S. Co., 86 Fed. 407.

[5] United States *v.* Workingman's Council, 54 Fed. 994; Waterhouse *v.* Comer, 55 Fed. 149; United States *v.* Elliott, 62 Fed. 801; 64 Fed. 27; Thomas *v.* Ry. Co., 62 Fed. 803; United States *v.* Agler, 62 Fed. 824; Charge to Grand Jury, 62 Fed. 828, 834, 840; United States *v.* Debs, 64 Fed. 724; United States *v.* Cassidy, 67 Fed. 698; *In re* Debs, 158 United States, 564.

[6] United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 334.

doubt. Railroad transportation had been covered in 1887 by the Interstate Commerce Act. The Sherman Act of 1890 was intended to cover not transportation, but trade. "No rule is better settled than, where a general statute has been enacted, which might include, in the absence of other provisions, a subject matter which has already received consideration at the hands of the legislature by a special act, the general act will not be construed to embrace the subject contained in the special act, unless it clearly appears from the language employed that it was the intention of the legislature that it should be so included." [1]

No such intention appears from the act — indeed, in some respects the two statutes if applied to the same subject are inconsistent with each other.

The explanation is that the Sherman Act was not intended to operate upon the business of transportation, and this conclusion, which appears upon the face of the statute, is strengthened by reference to the debates in Congress.[2] The courts had however necessarily applied the law to the employees of railroads.[3] Could it

[1] United States *v.* Freight Ass'n, 53 Fed. 440, 455.

[2] The bill, as framed by the Senate, made no reference to transportation. In the House an amendment was offered forbidding contracts to prevent competition for transportation of persons or property from one State to another. Cong. Rec., Vol. 21, Part 5, p. 4099. In the Senate the House amendment was amended by limiting the prohibition to contracts "so that the rates of such transportation may be raised above what is just and reasonable." Cong. Rec., Vol. 21, Part 5, p. 4753. In this modification the House refused to concur and a conference was had which resulted in a report favoring the Senate amendment, saving, however, State jurisdiction. In this report the House again refused to concur. Cong. Rec., Vol. 21, Part 6, p. 5981. Subsequently both Senate and House receded from their amendments, Cong. Rec., Vol. 21, Part 7, pp. 6208, 6312, and the bill became a law in the form in which it originally passed the Senate, without reference to transportation.

[3] A proviso that the Sherman Act should not apply "to any arrangements, agreements or combinations, made between laborers with a view of lessening

be said then that the employer was exempt? Was the statute intended to prevent violent interference with interstate commerce and at the same time to permit such interference as might come from contracts which restrained competition between carriers? When the employee sought to throw the whole burden of the law upon the employer, the courts refused to admit a difference between them.

"If the officers or agents of the car companies, who might or might not be capitalists, would be individually responsible for violating the statute, upon what principle could the brakeman or switchman be exempt? . . . Does the guilt or innocence of the defendants of the charge of conspiracy, under this statute, depend on the proof there may be of their success in drawing to the support of their design those who may be called capitalists, or does it depend upon the character of the design itself, and upon what has been done towards its accomplishment by themselves and by those in voluntary co-operation with them, from whatever employment or walk in life?" [1]

Railroads then could not be exempt from the operation of the statute. If it be said that a distinction was made by Congress which had regulated railroads by one act and laborers by another, the answer must be that Congress had forbidden all combinations which restrained commerce; that the prohibition applied to all who interfered with transportation and that this might as easily be accomplished by a combination of carriers

hours of labor or of increasing their wages, nor to any arrangements, agreements or combinations among persons engaged in horticulture or agriculture, made with the view of enhancing the price of agricultural or horticultural products" was not adopted.

[1] United States *v.* Debs, 64 Fed. 755. See speech of Senator Edmunds, March 27, 1890, 21 Cong. Rec., pp. 2728–2729.

as by a combination of their employees. The question was not free from difficulty, but the distinction which Congress may have intended, appeared in practice to be impossible of observance.

Extent of the prohibition. This conclusion at once presented the further difficulty of finding for the statute a rule of construction applicable at the same time to combinations of employees and of employers.

In forbidding contracts and combinations in restraint of trade, Congress had employed a phrase well known to the courts. In those classes of cases to which it had traditionally been applied, the law had given to the phrase a well-understood definition. Many contracts restrain trade more or less, but those which could affirmatively, with reference to some accepted standard, be shown to be reasonable, were on this ground upheld. This practice appears to be acknowledged in the title of the Federal statute, — "An act to protect trade and commerce against unlawful restraints and monopolies." It seems to have been recognized, however, when the bill was before Congress that its operation might be wider than the legal definitions of the terms employed,[1] and in application by the courts this fact soon became evident.

In the case of labor unions the law provided no standard by which to measure the question of reasonableness. There are historical and logical rules by which a court can determine how far the vender of a business should

[1] The Chairman of the Judiciary Committee of the House in reporting the bill said, "Now just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of the trade or commerce mentioned in the bill, will not be known until the courts have construed and interpreted this provision." Vol. 21, Cong. Rec., Part 5, p. 4089.

restrain himself from competition, but there are no rules which enable courts to fix rates of wages for switchmen, engineers, or any other class of laborers throughout the country, or to determine the hours of work or conditions of service.

The question of reasonableness, then, upon which courts are accustomed to pass under conditions for which the law has established standards capable of judicial application, is not a judicial question under conditions such as those which are presented in most cases arising upon combinations of workmen. Violence, it may be admitted, is itself a violation of law, and a combination to do violence is necessarily unreasonable. What shall be said, however, of a combination of a large number of laborers, which without violence — whether successfully or not — attempts to prevent the operation of great avenues of interstate transportation? It is the combination which the statute forbids, and the alternative in all such cases is therefore presented to the court, to declare every such combination illegal under the statute, or in every case to enter into the consideration of the reasonableness of the purposes which it may seek to accomplish. The latter they could not do. "We did not put into our bill," said Senator Hoar, "the words 'unlawfully and improperly restrained' because we were afraid it would be objected that we were giving the court a legislative power to declare what was improper." [1]

Here then is the fundamental difficulty with the Sherman Act, that it attempted to impose upon the courts the

[1] Speech in Senate, Jan. 6, 1903, Cong. Rec., Vol. 36, Part 1, p. 522, 57th Cong., 2d Sess.

duty which Congress had been unable to perform, of distinguishing between those combinations which should be permitted, and those which should be forbidden. Under the form of using words which had a settled legal meaning, but nevertheless a meaning which was inapplicable to the economic conditions which the statute was intended to remedy, the courts were to be compelled to determine what combinations were lawful and reasonable, and what were unlawful and unreasonable. This duty a court in the nature of things cannot perform, and had the statute at once shown that the questions involved were of the character which experience has now disclosed, the act might have been declared unconstitutional.

The nature of the statute did not, however, at that time appear. Its language was simple — all combinations in restraint of interstate trade were forbidden. No standard of reasonableness existed which could apply to all combinations, and no distinction could be made in the construction of a statute which forbade all alike. It was impossible for courts to set up a standard of reasonableness. When this subject was presented by combinations of railroad employees the court held that "A combination whose professed object is to arrest the operation of railroads whose lines extend from a great city into adjoining States, until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is certainly an unlawful conspiracy in restraint of commerce among the States." [1]

[1] United States *v.* Elliott, 62 Fed. 801, 803.

This doctrine was followed by a divided court in the case of the Trans-Missouri Freight Association,[1] a combination of common carriers, formed under conditions of excessive competition for the maintenance of reasonable rates. Such an agreement the Court said was in restraint of commerce among the States, and as such prohibited by the statute. It was impossible to make the validity of such contracts depend upon the view which a court might take as to what was reasonable, for no standard existed by which reasonableness could be measured.

"If only that kind of a contract which is in unreasonable restraint of trade be within the meaning of the statute and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities: which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated?

[1] 166 U. S. 290.

If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation." [1]

Into these questions the Court refused to go: —

" The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the law-making branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do." [2]

This decision, representing probably the only conclusion which could be reached by a judicial body, was rendered by a divided court, and became at once the subject of widespread criticism.[3] If all contracts which in any degree restrain trade be void, it was said, the formation of corporations, the contract of partnership, the sale of the good will of a business, and many other

[1] United States *v.* Freight Ass'n, 166 U. S. 290, 331, 332, followed by United States *v.* Joint Traffic Ass'n, 171 U. S. 505.

[2] 166 U. S. 340.

[3] See "Constitutionality of the Anti-trust Act," by Mr. William D. Guthrie, 11 *Harvard Law Review*, 80.

ordinary transactions of commerce, were forbidden. A judgment which brings reasonable contracts within the condemnation of the statute, Mr. Justice White said, "is tantamount to an assertion that the act of Congress is itself unreasonable. The difficulty of meeting, by reasoning, a premise of this nature is frankly conceded, for . . . it would seem conducive to no useful purpose to invoke reason as applicable to and as controlling the construction of a statute which is admitted to be beyond the pale of reason." [1]

The criticism seems to go farther than the doctrine of the prevailing opinion. The language in which the majority of the Court announced their conclusions was broad. Some of the phrases employed appeared to introduce a radical departure from the rules of the common law, but it is clear now that no such departure was intended. The formation of corporations for business or manufacturing purposes, the Court later remarked, has never been regarded as in the nature of a contract restraining trade, and the same may be said of a contract of partnership.[2] So, too, a contract by the seller of a business to refrain from competition with the buyer has been sustained.[3] Contracts known as "factors' agreements" [4] and agreements by which the purchaser of an article restricts the territory for his trade in that article [5]

[1] 166 U. S. 344.
[2] United States *v.* Joint Traffic Ass'n, 171 U. S. 505.
[3] Cincinnati Packet Co. *v.* Bay, 200 U. S. 179.
[4] Whitwell *v.* Continental Tobacco Co., 125 Fed. 454; Lanyon *v.* Garden City Sand Co., 79 N. E. Rep. 313; Conf. Norton *v.* Thomas & Sons Co., 93 S. W. 711; and Commonwealth *v.* Straus, 78 N.E. 136, the statute in this latter case being broader than the Sherman Act.
[5] Phillips *v.* Iola Cement Co., 125 Fed. 593.

have also been sustained, as have limitations imposed by the Chicago Board of Trade upon the distribution of its quotations.[1]

In substance then the decision which at first seemed so radical, in fact left all those contracts in which the restraint of trade was imposed as ancillary to the main purpose of a lawful contract, precisely where they were at common law. These contracts carry in their own provisions the standard by which the reasonableness of the restriction may be measured.

Even as thus applied, however, the statute probably goes farther than the intentions of Congress.

The large number of mercantile exchanges and boards of trade throughout the country show the demand for some organization by which buyers and sellers can be brought together, and experience shows the necessity, in such cases, of having a general agreement fixing the amount of commissions and other charges. A rule which would make these organizations illegal would embarrass commercial intercourse, and yet in two cases[2] this result was avoided only by narrowing the definition of interstate commerce. The questions which arise upon the statute are many and difficult. The Court cannot refuse to consider the effects of its decisions, and yet cases like these, which introduce into a statute exceptions not made by Congress, seem, for a doubtful advantage,[3] to introduce the element of uncertainty into the law.

[1] Board of Trade *v.* Christie Grain & Stock Co., 198 U. S. 236.

[2] Hopkins *v.* United States, 171 U. S. 578, and Anderson *v.* United States, 171 U. S. 604.

[3] The exchange before the Court in the Hopkins Case was held illegal under State law. Greer *v.* Payne, 4 Kan. App. 153. See Cattle Raisers Ass'n *v.* Fort Worth, &c., R. R. Co., 7 Int. Com. Rep. 513, 535.

The field of Federal jurisdiction. The cases marking the line of division between State and Federal powers indicate even greater uncertainty than those which construe the terms of the statute.

Early decisions gave to the act the operation which Senator Hoar anticipated. The acquisition by an Illinois corporation of most of the distilleries in the country, located in many different States, and supplying markets in all the States, did not violate Federal law.[1] The same rule was applied to the acquisition by a New Jersey corporation of substantially all the sugar refineries in the country. In this case the Circuit Court held that "The contracts and acts of the defendants relate exclusively to the acquisition of sugar refineries and the business of sugar refining in Pennsylvania. They have no reference and bear no relation to commerce between the States or with foreign nations. Granting therefore that a monopoly exists in the ownership of such refineries and business (with which the laws and courts of the State may deal) it does not constitute a restriction or monopoly of interstate or international commerce. The latter is untouched, unrestrained and open to all who choose to engage in it. . . . It is the stream of commerce flowing across the States, and between them and foreign nations, that Congress is authorized to regulate." [2] In the Circuit Court of Appeals this doctrine was affirmed. "The utmost that can be said — and this, for the present purpose, may be assumed — is that they have acquired

[1] United States *v.* Greenhut, 50 Fed. 469; *In re* Corning, 51 Fed. 205; *In re* Terrell, 51 Fed. 213; *In re* Greene, 52 Fed. 104; see, however, American Biscuit Co. *v.* Klotz, 44 Fed. 721.

[2] United States *v.* E. C. Knight Co., 60 Fed. 306, 309.

control of the business of refining and selling sugar in the United States. But does this involve monopoly, or restraint, of foreign or interstate commerce? We are clearly of opinion that it does not." [1]

"Doubtless," Mr. Chief Justice Fuller said, "the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly." [2] "Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution to limit . . . the right of corporations created by the States, or the citizens of the States, in the acquisition, control, and disposition of property." [3]

On the other hand a combination of producers in Kentucky, to fix the price of an article in Nashville, Tennessee, was held to be within the Federal prohibition.[4] The same conclusion was reached in the case of a combination of coal dealers in West Virginia under a contract creating a joint selling agency for "the western market," each member agreeing not to ship to points west of their mines, except under the terms of the contract.[5]

In both of these cases the combination referred to contracts for sale and delivery across State lines, — in the first case the territory covered being described by reference to political boundaries; in the second case by

[1] United States *v.* E. C. Knight Co., 60 Fed. 934, 936.
[2] United States *v.* E. C. Knight Co., 156 U. S. 1, 12; Merz Capsule Co. *v.* U. S. Capsule Co., 67 Fed. 414.
[3] Judge — afterward Mr. Justice — Jackson, *In re* Greene, 52 Fed. 104, 112–113.
[4] United States *v.* Jellico Mountain Coal, etc., Co., 46 Fed. 432.
[5] United States *v.* Chesapeake, etc., Fuel Co., 105 Fed. 93.

reference, in commercial phrase, to the place of production and the market for distribution.

The same rule was applied in Lowry *v.* Tile Association.[1] This was a combination of dealers in tiles in San Francisco. Manufacturers wherever located were eligible to non-resident membership, and it was agreed that no dealer member should purchase from a manufacturer not a member, and that no manufacturer member should sell to non-members in San Francisco. It was stated that all tile used about dwellings in California was manufactured in Eastern States. Whether this were true or not, the contract, however worded, if so drawn as to restrict the right of members to purchase or sell goods in other States, was to that extent within the Federal statute. This decision was affirmed by the Supreme Court.[2]

Up to this point, the line between State and Federal jurisdiction was well defined and observed. The indefiniteness, of which Secretary Taft speaks, exists only in courts of inferior authority, and is the result of a very recent attempt to abandon established doctrines, and to overstep established restrictions of power. An announcement of these new rules is found in Gibbs *v.* McNeeley,[3] an action for damages under the seventh section of the statute. The plaintiff in this case alleged that he had been engaged in the business of buying red shingles, in the State of Washington from manufacturers

[1] 98 Fed. 817; 106 Fed. 38; 115 Fed. 27; Ellis *v.* Inman, Poulsen & Company, 124 Fed. 956; 131 Fed. 182.

[2] Montague *v.* Lowry, 193 U. S. 38. See also United States *v.* Swift & Co., 196 U. S. 375; 122 Fed. 529.

[3] 102 Fed. 594; 107 Fed. 210; 118 Fed. 120.

in that State, and selling in other States and countries; that these shingles are made only in Washington, the output being very large, and a comparatively small amount only being consumed in that State; that the defendants, who were manufacturers of shingles, had entered into a combination fixing prices at so high a figure that plaintiff's former customers refused to continue their trade; also that defendants in pursuance of these purposes, had closed their mills and that in consequence plaintiffs had been entirely unable to purchase shingles. The lower court held that neither in his charge of a combination to fix prices, nor in the concerted closing of mills, had plaintiff shown a violation of the Federal statute.

"Both of these causes of action appear to be predicated upon a notion that because the plaintiff was a buyer and exporter of shingles he had a vested right to the benefit of unrestrained competition for trade among manufacturers." [1]

This decision the Circuit Court of Appeals reversed, saying: —

"We do not think that the act contemplates that the combination therein made unlawful must be one which shall by its terms refer to interstate commerce. It is enough if its purpose and effect are necessarily to restrain interstate trade. If it were otherwise, all combinations in restraint of interstate trade might be so expressed in words as to avoid the statute. The true test would seem to be, not what the agreement professes, but what it accomplishes. The combination must be dealt with in view of the known facts which surrounded it when it was formed, and which still attend it. It is impossible that the parties to it had in view

[1] 102 Fed. 596.

only domestic trade. . . . The combination in the case before the court is more than a combination to regulate prices; it is a combination to control the production of a manufactured article more than four-fifths of which is made for interstate trade, and to diminish competition in its production, as well as to advance its price. These features, we think, determine its object, and bring it under the condemnation of the law." [1]

Let all this be admitted. Had defendants agreed not to sell to persons in other States, or in any way restricted their right to make interstate sales, their agreement would have been illegal under the Federal statute. Had the defendants, leaving themselves entirely free in interstate sales, restricted only their conduct in domestic trade within the State of Washington, this agreement, whether legal or illegal under State law, would have been unaffected by the Federal statute. The question, therefore, whether plaintiff was entitled to sue upon the Federal statute for damage to his business, depends upon the question whether the commerce which was restrained was within the protection of the statute.

Now it is clear that defendants' sales to plaintiff were domestic commerce within the State of Washington. That plaintiff may have contemplated a further transaction, did not make the transaction of purchase interstate. So far as the second, hoped-for transaction is concerned the effect would be the same had the defendants' agreement referred only to domestic trade.

In the Addyston case Mr. Justice Peckham said, "It is the sale and delivery of a certain kind and quality of pipe, and not the manufacture, which is the

[1] 118 Fed. 126–127.

material portion of the contract, and a sale for delivery beyond the State makes the transaction a part of interstate commerce." [1]

In Gibbs *v.* McNeeley the transaction is followed one step further back, and a sale to the person who intends to sell and deliver across State lines is brought within Federal jurisdiction. To this course of development no limit can be placed. "The defendants in error," said the Circuit Court of Appeals, "were engaged in manufacturing a product of which, as they well knew, more than eighty per cent was to be sold, delivered and used in States other than that of its manufacture." The fact nevertheless remains that the transactions between plaintiff and defendants were domestic commerce, and that if the combination among the defendants, so far as concerned the plaintiff, fell within the Federal statute, it was so only because of an act with which the defendants were in no way connected, — the shipment of the shingles by plaintiff to other States or foreign countries.

In one of its earlier forms, before it had been so amended by the Senate as to be a new bill, the Anti-trust Act was capable of this very construction. Debating the bill in this form, Senator George said:

> Whether an agreement, "shall be held lawful or unlawful, whether it shall come within the provisions of this bill or not, depends upon an act to take place after the agreement is made. So far as this bill is concerned, the agreement may be perfectly lawful at the time it is made and it will become unlawful by a matter which may take place months afterwards, and by an act

[1] 175 U. S. 211, 242.

. . . to which the parties to the agreement were in no way privy, and for which they are in no way responsible. For instance, A and B combine to raise the price of domestic products. If the thing stops there they cannot be punished under this bill . . . but if C . . . having acquired some of the goods . . . transports them from one State to another, then the crime is consummated. What a remarkable anomaly is that in legislation! The agreement when made is lawful, it only becomes unlawful by the subsequent act of men, not parties to it, . . . and, . . . what is more remarkable, it becomes unlawful by the lawful act of these subsequent parties."[1]

The result of the decision appears to be that to protect dealings in the eighty per cent of the shingles which ultimately go to other States or foreign countries, the Circuit Court of Appeals took jurisdiction of the whole trade in shingles in Washington. So in Bobbs-Merrill Co. *v.* Straus[2] it was said of agreements "embracing at least ninety per cent of all publishers and dealers in copyrighted books" that "as the combination extends throughout the United States, by the very terms of the agreement, interstate commerce is necessarily restrained."

In Loder *v.* Jayne[3] an action for damages under the seventh section of the act was sustained, apparently on the ground that the combination of which defendants were members controlled ninety per cent of the trade in proprietary medicines. So far as concerned the Federal statute the combination was illegal only in so far as it

[1] Speech in Senate, Feb. 4, 1889, 20 Cong. Rec., 1459, 1460.

[2] 139 Fed. 155. See also, Mines v. Scribner, 147 Fed. 927.

[3] 142 Fed. 1010. The distinction between domestic and interstate commerce was neglected also by the Circuit Court of Appeals, which on Dec. 1, 1906, reversed the decision below on grounds which do not concern the present question.

restrained plaintiff from buying in other States goods for delivery in Pennsylvania, or from buying in Pennsylvania, in original packages, goods which had come from other States. Damages appear to have been awarded without reference to this distinction. If this be true, the judgment went far beyond the Federal jurisdiction.[1]

"Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the State. The combination herein described covers both commerce which is wholly within a State and also that which is interstate.

"In regard to such of these defendants as might reside and carry on business in the same State where the pipe provided for in any particular contract was to be delivered, the sale, transportation and delivery of the pipe by them under that contract would be a transaction wholly within the State, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some non-resident of the State eventually obtained it." [2]

In the most recent cases, before the lower courts, this distinction receives little attention, and the size of the defendant combination appears to be of increasing

[1] As to recovery of damages under State law for restraint of domestic commerce, see Klingel's Pharmacy *v.* Sharp, 64 Atl. 1029.

[2] Mr. Justice Peckham in Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 247.

importance, as is shown by the repeated reference in different cases to the proportion of trade controlled.

The jurisdiction of Congress is founded however on its power over commerce. Trade across State lines comes within Federal power, although it may be conducted on a small scale. Large dealers, if they engage only in domestic trade, as may be true of manufacturers or farmers whose entire product is sold where produced, are beyond Federal power. In any event, State control over all trade, except that conducted across State lines, is complete.

If this rule be abandoned, what standard of size shall be the test of Federal jurisdiction? And how shall the courts fix such a standard?

"It would certainly be dangerous if the legislature should set a net large enough to catch all possible offenders and leave it to the court to step inside and say who might rightfully be detained, and who should be set at large. That would, to some extent, substitute the judicial for the legislative department of government. . . . To limit the statute in the manner now asked for, would be to make a new law, not to enforce an old one." [1]

The next decision upon the Sherman Act came in the case of the Northern Securities Company.[2] This case

[1] United States *v.* Reese, 92 U. S. 214, 221.

[2] Northern Securities Co. *v.* United States, 193 U. S. 197; 120 Fed. 721; Conf. Minnesota *v.* Northern Securities Co., 123 Fed. 692; 194 U. S. 48. Among the many articles on this case see pamphlet by Mr. J. L. Thorndike, "The Decision in the Merger Case" (Little, Brown, & Co., 1903); also review of this pamphlet by Professor C. C. Langdell, 17 *Harvard Law Review*, 41; and a reply to Professor Langdell by Governor Daniel H. Chamberlain, 13 *Yale Law Journal*, 57; "The Merger Case and Restraint of Trade," by Sir Frederick Pollock, 17 *Harvard Law Review*, 151; "The Northern Securities Decision," by Professor George F. Canfield, 4 *Columbia Law Review*, 315. "The Legal Aspect of Monopoly," by Mr. Herbert Pope, 20 *Harvard Law Review*, 167.

is often mentioned as though holding that the acquisition and ownership of competing concerns engaged both in domestic and interstate commerce is forbidden by the Federal statute. It does not so hold. A minority of the Court found that the Securities Company came into existence only for the purpose of suppressing competition between competing railways. Another justice concurred in the result upon the ground, in part, that the decree enforced the purpose and policy of State law.

It is entirely clear that the Court did not depart from its judicial functions, nor attempt to legislate upon the size of corporate combinations; and clear too that the acquisition of new interests or the combination of different interests under one ownership, either by direct purchase or by the holding of stock, was not brought within the statute. A rule which would have this effect would prohibit not only size but growth. "To those only very partially cognizant of the state of stock holdings in this country," the United States Circuit Court of Appeals for the Fifth Circuit said in 1894, "the contention seems to be revolutionary." [1] Upon this subject the position of the Supreme Court is emphatic. "The formation of corporations," it recently held, "has never to our knowledge been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership." [2]

A very large part of the business organizations of the country have been constructed in reliance upon this unquestioned doctrine,—that the union of competing

[1] Clarke *v.* Richmond, &c., Ry. Co., 62 Fed. 328.
[2] United States *v.* Joint Traffic Ass'n, 171 U. S. 505, 567.

interests in one ownership is not, in itself, a regulation of commerce.[1]

No other rule is consistent with constitutional history. The possibility of great commercial combinations by means of stock ownership has long been recognized,[2] but no suggestion has been made of Federal jurisdiction upon this ground,[3] nor is such ownership now generally regarded as illegal.[4]

[1] "Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common." Pearsall *v.* Great Northern R. R. Co., 161 U. S. 646, 671. "The circumstance that both companies are under a common ownership does not affect the relations of the railway company to the public." Willson *v.* Rock Creek R. R. Co., 7 Int. Com. Rep. 83, 89. There is a dictum in Clarke *v.* Central Ry., &c., Co., 50 Fed. 338, 346, that a common ownership of stock in competing railways is "within the spirit, if not within the letter, of the act of Congress." In the Circuit Court of Appeals a different view was taken. Clarke *v.* Richmond, &c., Ry. Co., 62 Fed. 328. That stock ownership is not control, see Pullman's Car Co. *v.* Missouri Pacific R. R. Co., 115 U. S. 587; Porter *v.* Steel Co., 120 U. S. 649, 670. Conf. Pennsylvania R. R. Co. *v.* Commonwealth, 7 Atl. 368, a case arising under State law; also Commonwealth *v.* New York, &c., R. R. Co., 132 Pa. St. 591.

[2] House Report No. 57, 40th Cong., 2d Sess., p. 7, June 9, 1868. "Shall I be met with the statement that still the old question will arise of one railroad company buying out the stock of another, consolidating the powers and rights of separate railroads under the management of one and then regulating their affairs as the one great mammoth company shall decide?" Speech of Senator Oglesby, June 3, 1874, Vol. 2, Cong. Rec., Part 5, p. 4506.

[3] "The statutes, of this State and of Massachusetts, creating corporations for the purpose of making canals and locks, connected with the waters of Merrimack and Connecticut Rivers, and also many statutes, creating corporations for the purpose of making turnpikes and bridges, act upon the commerce between the two States; yet it is believed, that no one ever suspected, that those statutes could be deemed regulations of commerce, within the meaning of this clause in the Constitution of the United States." Scott *v.* Willson, 3 N. H. 321, 327.

[4] "We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term." Opinion of the Court in United States *v.* Joint Traffic Ass'n, 171 U. S. 505, 567; A. Booth & Co. *v.* Davis, 127 Fed. 875; Fechteler *v.* Palm Bros. & Co., 133 Fed. 462; Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507; Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484; Diamond Match Co. *v.* Roeber, 106 N. Y. 473.

The primary relations of the carrier or other corporation are to the State of its organization and to the States where it operates. Federal control relates directly to but one of its functions, and to the corporation only in respect to, because of, and to the extent of its exercise of, that function. The means to be adopted for the encouragement of transportation or commerce within each State, are determined by that State alone. State monopolies of transportation have, therefore, always been permissible, save that the States could not refuse railroads operated by steam, the right to make connections and to transport goods to other States as granted by the Federal Act of 1866.[1]

Trading monopolies have also been granted by the States, subject, however, to the limitation which prevents prohibition of the sale in original packages of goods brought from other States or foreign countries.

It should be noted, too, that if the combination of competing interests in one corporation under State law be a regulation of commerce, all State laws authorizing such consolidations are void, on grounds which are independent of the Anti-trust Act. The rule established in Cooley *v.* Port Wardens [2] was that in all matters of a general nature, such as admit of uniform regulation throughout the country, the Federal power is exclusive of all State action. It probably needs no argument to show that the organization and consolidation of interstate railways, and of other corporations engaged in commerce, and the purchase or leasing of lines of road,

[1] United States Rev. Stats., Sec. 5258.

[2] 12 How. 299.

and of additional plants, if within this classification at all, are matters of more than local interest, and concern more States than one. If, therefore, laws on this subject be regulations of commerce, they have long been wholly beyond the competency of the State, not because of any Federal statute, but because of the broad prohibition of the Constitution. The Sherman Anti-trust Law, if it apply to such cases, is merely a statutory declaration made in 1890 of a rule which has been recognized at all times since 1851, and which was announced by the Supreme Court in 1824, as long accepted.

As a matter of fact, however, the great railway and corporate system of the country has been built under State law. With few exceptions the corporations have been organized by the States. From time to time they have sold their property, or have purchased or leased the property of other companies, and have consolidated or merged with other corporations. All this has been, and must still be done, under State law.

Suppose a railroad organized under State law should, in order to help another road, cease to operate its own, as is true, for example, to a limited extent of the West Shore road, which no longer competes with the New York Central for certain classes of business. Could Congress forfeit its charter, or compel it to operate? And — if the cesser were not authorized by State law — would it be beyond the power of the State to do either? The carrier's duty to receive, carry, and deliver comes from State law. A State may refuse to impose this duty — may even refuse to grant the privilege to a

corporation created by it. New Jersey gave this right for transportation between New York and Philadelphia to the Camden & Amboy Railroad, and denied it to other companies. This was the occasion for the Federal statute of June 15, 1866, which gave connecting carriers the right to transport from State to State, but did not assume to impose an obligation. The debates in Congress when this bill was under discussion, show very clearly what then were the powers of the United States and of the States.

It is said that the holding of stock by the Northern Securities Company amounted to a virtual consolidation of the Great Northern and Northern Pacific, and for this reason was illegal. Can Congress authorize consolidation of railroad companies, organized under State laws? Congress has never done so nor has such a theory been advanced. To hold now that Congress can either authorize or forbid consolidation of State corporations, would be a complete reversal of the constitutional doctrines of a hundred years, and would require a new reading of Gibbons *v.* Ogden and of Cooley *v.* Port Wardens.

Result of the authorities. In particular cases the lines separating State and Federal powers are often difficult to trace, but the general purposes which distinguish the two governments are so well marked, that if these purposes be consistently followed, particular decisions, even when doubtful, are not likely in the end to establish serious departure from constitutional principles.

"The powers delegated by the proposed constitution to the Federal government," Madison said, "are few and defined; those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce, with which last the powers of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State." [1]

It is not likely that a union of the States could, at any period of American history, have been formed upon another principle. We know, Mr. Chief Justice Marshall said, that the people of no one State would "trust those of another with a power to control the most insignificant operations of their State government." [2] Congress should, indeed, have powers adequate for the "maintenance of harmony and proper intercourse among the States," [3] but this involved no control over State administration.

Among the matters thus left to the States was the entire subject of corporations. It was long doubtful whether Congress could, for any purpose, establish a corporation under its national powers. State jurisdiction over the subject was never questioned. Substantially all business may be transacted in corporate form. The transfer of corporations to Federal control would, therefore, be of itself the establishment of almost complete centralization.

"It is undoubtedly true," the Supreme Court re-

[1] *Federalist*, No. 45.
[2] McCulloch *v.* Maryland, 4 Wheat. 431.
[3] *Federalist*, No. 42.

cently said, "that that which is implied is as much a part of the Constitution as that which is expressed," and that "among those matters which are implied though not expressed, is that the nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government."[1] "Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may not be unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution, as the preservation of the Union and the maintenance of the national government."[2]

A review of the decisions of the Supreme Court upon the Sherman Act shows that the Court, in construing the statute which is based upon the power of Congress to maintain intercourse among the States, has gone to the verge of Federal jurisdiction. An extension of present doctrines could be made only by sacrifice of State authority essential for efficient local government, and — a matter of still greater importance — by overturning long established principles of constitutional law.

[1] South Carolina *v.* United States, 199 U. S. 437.
[2] Texas *v.* White, 7 Wall. 700, 725.

CHAPTER VIII

CONCLUSIONS

THE two most important possessions of the American people are, — first, the Constitution, using the word in its broader meaning to include the actual system adopted for Federal administration, together with the general plan of local State government; and second, the habit of respect for law, which distinguishes an orderly democracy from personal rule.

There are some who believe, possibly with good reason, that the Constitution should be altered. Commercial and social conditions have greatly changed during the century last past, while the Constitution is largely what it was. Population has become dependent upon remote sources of supply. Each State is no longer sufficient for itself. It may be that the powers of the common government are inadequate to protect the common interests, and if so the central power should, so far as necessary, be increased.

Importance of State governments. On the other hand, maintenance of democratic government so that its administration shall be free from partial influences and directed for the good of all, demands that government be kept close to the whole people and that all participate.

It is difficult to secure capable and honest administration of public affairs, but the struggle for good government in cities, counties, and States, compelling the attention of every citizen, is the only security of the nation. Every measure which impairs the power or dignity of local governments, deteriorates the central authority.

That populations have become dependent upon remote sources of supply, is true not only of American States, but of all civilized nations. No country is now sufficient for itself. At the same time, however, that international dependence has increased, the need for local self-government has immensely increased. No one who knows the differences in character and occupations which mark the populations of our various States, who understands the importance and difficulty of the many questions with which State governments are dealing each in its own way, and their growing complexity with growing population, can wish to transfer these burdens to committees of Congress already fully occupied with national affairs.

It is fortunate that the regulation of corporations, which now takes public attention, can be accomplished by State legislation (*ante*, pp. 156–175). The subject concerns so closely the common affairs of daily life, and should be determined with reference to conditions and occupations which vary so widely in different States, that its transfer to Federal control would seriously limit local autonomy.

It is clear then that if change in the Constitution be necessary, it should be so made as least to restrict the States.

Respect for law essential to free government. Of the habit of respect for law, more may be said, for here, upon the general principle, all agree. Without this habit government becomes dominion only, authority a weapon, safety impossible, protection unknown. All this, in form, is fully admitted. As a legal creed, none doubt that the Constitution is the supreme law. As a fact, however, popular expression upon particular measures, even the attitude of some inferior courts, appears to indicate an unexpressed conviction that the Constitution, in the changed conditions of commercial life, is no longer a safe guide; that the process of amendment for which it provides is too difficult or too slow, that public interests make it necessary for Congress to grasp and exercise new powers, and for the courts to support these new jurisdictions. As yet these views are not avowed, their only expression being found by inference from the course of government, the attitude of public comment, and from decisions of some subordinate courts.

Much that is sought by these methods should in fact be effected. It is equally true, however, and far more important, that, whatever be the merit of particular measures, nevertheless, no lasting good can come from the adoption of methods which, unless restrained in season, are subversive of all government, which confuse executive, judicial, and administrative functions, and place the property, the liberty, — in the end perhaps the life, — of individuals at the disposition of an authority which acknowledges no final obligation to declared law, and whose judgment of public necessity is contained in the

decree made against the person who in a given case may be selected to illustrate governmental policy. For such government it is not likely that a professed defender could yet be found, and, nevertheless, judgments have been rendered which are possible only where government of this character is possible, as may be seen in cases already mentioned (*ante*, pp. 198–204) under the Anti-trust Act, whose decision has been controlled by the judicial view that different combinations, to which attention was directed in different cases, possessed an undue share of trade. There is no legal standard of corporate size by which these judgments can be supported, nor do they find precedent in any decision of the Supreme Court. The judges assumed to determine the political policy of States from which they hold no power, they required of defendants obedience to decrees which are law as against them only, and are not the equal law of the land. This is personal government, not the reign of law.

For this the sober consideration of society is not prepared. It is necessary, first of all, that the orderly processes of law — executive and legislative as well as judicial — be resumed; and then, whatever measures are adopted, that they be such as to make real progress toward permanent solution of undoubted evils, not a distraction merely of public attention, to lay foundation for arbitrary power, by gratifications of popular impulse.

For this reason it has been thought desirable to examine constitutional history of the relation of the Federal government to carriers and corporations, and to show as a fact by the practice of State and Federal governments definitely what these powers are and have been.

Constitutional construction by executive order. It is common to say that Congressional power over corporations is amply contained in the authority to regulate commerce with foreign nations, among the several States and with the Indian tribes; to quote Mr. Chief Justice Marshall, that this is a power to regulate commercial intercourse in all its branches, and to add in the language of the Supreme Court, that the power is plenary, that it extends wherever commerce extends, and acknowledges no limitations save those imposed by the Constitution.

Few, if any, doubt the correctness of these statements which have the weight of authority and long acceptance. They fail, however, to answer the question—what, after all, is the nature and extent of this plenary power, and what are the limitations imposed upon it by the Constitution?

A more direct answer is found in the statement given by Senator Knox, when Attorney-General, in his speech at Pittsburg, Oct. 14, 1902. The power, he said, is nothing less than authority to prohibit commerce, or to permit it, on whatever terms Congress may impose. In this suggestion he offered a method to bring all great industries within Federal control. Admitting apparently, as is unavoidable, that the manufacture and production of articles of commerce are within State jurisdiction, as is also the creation of corporations, determination of amount of capital, publicity, etc., Mr. Knox nevertheless urged, that Congress may "deny to a corporation whose life it cannot reach, the privilege of engaging in interstate commerce, except upon such

terms as Congress may prescribe to protect that commerce from restraint." "Such a regulation," he added, "would operate directly upon commerce, and only indirectly upon the instrumentalities and operations of production."

In other words, the position of the Attorney-General was that Congress has uncontrolled power to regulate or to prohibit interstate commerce, and that it may use this power to accomplish results that are wholly beyond its jurisdiction.

This answer, so far as it is an answer at all, depends upon the meaning of the phrase to regulate commerce. As a matter of language the words may be given the meaning thus ascribed to them, but they may also be given other and very different meanings. Which of these many meanings defines the actual grant of power contained in the Constitution?

Speculation upon the correct interpretation of the phrase is out of place. An effort to fasten new meanings upon the Constitution, disregarding history, national experience, and final adjudications of time and authority, is not constitutional construction and speaks only the economic views or the personal desires of an individual. The question of constitutional construction can be answered, as a matter of fact, from the history of the power over commerce, so as to leave no substantial doubt as to the extent of Federal authority.

The right to engage in commerce. It is said that Congress may grant or withhold the right to engage in interstate commerce. From what authority then does the

right of intercourse between persons of the same or different States arise?

Only the pressure of great interests could make the question seem debatable. When the Constitution was formed the doctrine of the inalienable rights of man expressed, both in America and in Europe, popular revolt against personal government, and against the system of restrictions and privileges upon which it was built. "The right to one's self," Thiers said, "to one's own faculties, physical and intellectual, one's own brain, eyes, hands, feet, in a word to his soul and body, is an incontestable right, one of whose enjoyment and exercise by its owner no one can complain and which no one can take away." Under the old régime in Europe, when "the prying eye of the government followed the butcher to the shambles, and the baker to the oven," when the peasant farmer could not "take the produce which he raised to market until he had bought leave to do so; nor consume what remained of his grain till he had sent it to the lord's mill to be ground, nor full his cloths on his own works, nor sharpen his tools at his own grindstone, nor make wine, oil or cider at his own press," industry was indeed a privilege, and the same narrow view of human rights appears in statutes relating to America, as, for example, those which forbade the manufacture of iron, or with some qualifications forbade trade with other countries than England.

All such restrictions of trade and intercourse in this country ended with the outbreak of the Revolution.

The right of intercourse between State and State, Mr. Chief Justice Marshall said, was not granted by the

Federal Constitution, but "derives its source from those laws whose authority is acknowledged by civilized man throughout the world" — in other words, the right to engage in interstate commerce is one of those inalienable rights, which State governments were formed to protect, and which every person may enjoy under State law, either alone, or upon such terms as the States may permit, in combination with others, as a member of a partnership or of a corporation. (See reference to Camden and Amboy monopoly, pp. 95, 209.) Constitutional history, the theories of law, and the decisions of the Supreme Court unite to support this view.

The Constitution knows no "privilege of engaging in interstate commerce." That was not a phrase which the Attorney-General learned from American history. The Constitution knows an inalienable right to engage in any of the common occupations of life, including the liberty to engage in interstate commerce, a liberty which comes from State law and belongs to those to whom the State gives it, whether citizen, corporation, or alien (*ante*, pp. 23–37).

Extent of the Federal power of regulation. It is said, however, that whether the right to engage in commerce be derived from State or from Federal law, nevertheless its exercise may be prohibited by Congress; that over foreign commerce this power has in fact been exercised in the embargo laws, and that control of foreign and interstate commerce being given in the same clause and in the same words is coextensive.

This is the theory of privilege, in form but slightly

changed, supported, as before, by an argument upon meanings now to be given to the language of the Constitution.

The argument proves too much. It is true not only as to foreign and interstate commerce, but also as to commerce with Indian tribes, that Federal power of regulation is granted in the same clause, and words. It is common knowledge, however, that over Indian commerce Congress has long exercised powers which are undoubtedly beyond its authority in relation to foreign nations, or to intercourse among the States. In the same way, distinctions have been recognized between Federal powers over foreign and interstate commerce.

In foreign relations the general government stands in the place of, and represents, every State for every national purpose. It may exercise its control to retaliate upon an unfriendly nation, or to injure an enemy; to influence international negotiations, or to avoid being drawn into unnecessary quarrels. Between independent nations having no common court of appeal, protection and self-defence are questions of power. Congress may therefore establish an embargo of foreign commerce.

In relation to interstate commerce, Congress occupies no such position and exercises no such jurisdiction. As Mr. Chief Justice Fuller very forcibly said, "under the Articles of Confederation, the States might have interdicted interstate trade, yet when they surrendered the power to deal with commerce as between themselves, to the General Government, it was undoubtedly to form

a more perfect union, by freeing such commerce from State discrimination and not to transfer the power of restriction" (*ante*, pp. 48–53).

It needs no argument to show that upon the maintenance of this distinction depends the continued existence of our constitutional form of government. If Congress may treat separate States as foreign nations, the ample powers which were given to the Federal government for common protection against external enemies, are easily sufficient to control the domestic policy of every State.

The extent of Federal power to regulate interstate commerce cannot be measured by its powers over Indian and foreign commerce, but must be determined by the purposes of the Constitution, and by the construction which has been placed upon the constitutional provision.

When the Constitution was formed, and for a considerable time thereafter, the commerce of the country was limited to the foreign and coasting trade. Commerce by means of navigation was the subject with which the Constitution dealt. Over this subject Federal control was established by the commerce clause, subject however to the restrictions that no preference be given to the ports of one State over those of another, and that vessels bound to or from one State be not obliged to enter, clear, or pay duties in another. These expressions show that the controlling idea of navigation was kept in view.

The power of regulation, which the Constitution granted to Congress was external, operating from the ports outward, closely related to the admiralty power.

It did not and could not interfere with domestic State government. That was "the simple power of regulating trade" from which "no apprehensions were entertained" and which was granted by "the common consent of America." Congress being, therefore, without jurisdiction over carriage among the States, there was no need to provide that it should not tax or prohibit such carriage, for Congress had no power to which such a restriction could apply.

Land communication was of subsequent growth. Its purpose, like that of the coasting trade, was to facilitate intercourse between the States, a subject which even from the beginning assumed great importance and took a large share of public attention. Intercourse between the States was not, however, a subject of Federal jurisdiction. Coasting trade, even between ports in the same State, was within Federal jurisdiction, because conducted on the high seas where the national character of the vessel was recognized, where she was beyond State jurisdiction, occupying the common property of mankind subject to such laws as had secured the assent of commercial nations. Land communication, on the other hand, was within the control of the State, because conducted within its limits, subject to its laws.

Originally as a matter of history, and primarily as a matter of interest, communication between persons and places is of local importance. A man's first concern is to reach his nearest neighbors and his most convenient source of supply. The same is true of communities. As means of communication improve and transportation becomes easier, more distant communities come

into touch, until finally communication is established between distant States. This, however, is but an extension of a service which is within State jurisdiction at every point. The Constitution intended, in Madison's words, to establish "an unrestrained intercourse between the States," but this intercourse was to be "on the basis of equal privileges."

Over communication so conducted, therefore, State jurisdiction was exercised to the fullest extent.

The problem of the time was to secure effective service. States could not establish and operate lines of coaches, build bridges, and maintain ferries. Transportation must pay for itself, and this could be accomplished only by giving exclusive rights.

Monopolies were granted therefore in every State, operating across State lines, in every direction, with the express approval of the Supreme Court and the legislative approval of Congress. This policy was neither accidental nor a temporary expedient. Canals and railways were built in the same way, and the policy which began in the East extended throughout the country, and continued unquestioned until after the Civil War — in some respects still continues.

A State could not, however, grant a monopoly of the coasting trade, for this was within Federal jurisdiction over commerce. Here, then, is the "plenary" power to which Mr. Chief Justice Marshall referred, in the phrase so often quoted from Gibbons *v.* Ogden, a plenary power to regulate the coasting trade, — a power, indeed, which acknowledges no limitations save those imposed by the Constitution, but which nevertheless in

1824 concerned communication by navigation when conducted upon tide water (*ante*, Ch. III). Even as late as 1855, it was generally considered, Mr. Justice McLean said, that "the right to regulate commerce had been exhausted" in Federal control of navigation.

What, then, is the origin of the present power which Congress possesses over land transportation?

The Constitution undoubtedly intended to establish free intercourse among the States, and for this purpose imposed a number of limitations upon State power, including a prohibition of taxation of imports and exports. These limitations, Edmund Randolph suggested, Congress might keep "undiminished in their operation," by legislation under the commerce clause. The suggestion was taken up by the Supreme Court in the case of Brown *v.* Maryland, where the existence of a Federal jurisdiction, under the commerce clause, to prevent violation of the constitutional provision forbidding State taxation of imports, was treated as a distinct limitation, by the commerce clause, upon State taxing powers (Ch. IV).

This new theory of construction, when adopted, may have seemed of small importance, for the tax then in question was unconstitutional on other grounds. In the case of the State Freight Tax, however, decided in 1872, its real importance began to appear. The tax there involved was imposed by a State upon every ton of freight carried within its limits. Such a tax, the State authorities considered, was not strictly a tax upon imports or exports. On the other hand, the burden which it imposed upon commercial intercourse was as sub-

stantial as it would have been had it fallen within the precise terms of the constitutional prohibition. The tax was held invalid because prohibited by the commerce clause. Other applications of the same argument have deprived the States of power to regulate rates charged for interstate transportation, have forbidden State taxation of commercial travellers negotiating sales of goods to be brought from other States, and in general have protected the trade of the country from all restraints (Ch. V).

The important feature of this history is that the power which Congress now possesses over intercourse among the States, is not an original power granted by the express terms of the Constitution. Jurisdiction derived from the commerce clause, upon which so much emphasis is laid as a plenary power supreme over all State law, proves, if taken alone in its constitutional meaning, to be narrow and insufficient even to support existing legislation.

The power of Congress rests, then, not upon this clause alone, but upon the commerce clause in connection with the limitations upon the States. It is, in fact, essentially a development of these limitations, — the establishment of a Federal jurisdiction to preserve intercourse among the States from unconstitutional impediments, a power to keep open the ways from State to State. Federal authority over intercourse is the product of a history in which the limitations upon the States and the declared purposes of the Constitution have been of controlling importance; it is a resulting power, expressed only in the decisions of the Supreme Court,

which have developed the existing jurisdiction and alone mark its extent and its limitations. In this course of decisions may be found not only a monument to the great men who have sat upon the bench of that Court, but a lasting memorial of the constructive statesmanship of the Constitution. "If there be any single fruit of our national unity," Senator Sumner said, "if there be any single element of the Union, if there be any single triumph of the Constitution which may be placed above all others, it is the freedom of commerce among the States, under which that free trade, which is the aspiration of philosophers, is assured to all citizens of the Union, as they circulate through our whole broad country, without hindrance from any State." Without hindrance, indeed, from the United States itself, for the jurisdiction which Congress has acquired over the avenues of interstate trade, is a jurisdiction to prevent impediments, an "element of Union," in Senator Sumner's phrase, and does not authorize the closing of these avenues to any person.

Regulation for purposes beyond Federal jurisdiction. The establishment of Federal control over the commerce of the country, in the methods proposed, by compulsory incorporation under Federal law or by a system of governmental license depends, not only upon acceptance of the proposition that Congress may at will exclude any person or corporation from interstate commerce, but also upon the further proposition that Congress may exercise this power to accomplish results which are wholly beyond its jurisdiction. Such a regulation,

the Attorney-General said, "would operate directly upon commerce, and only indirectly upon the instrumentalities and operations of production."

This is but the announcement of the doctrine, as a principle of internal governmental administration, that Congress may rightfully do whatever it can, by indirect methods, bring about.

Federal incorporation receives no assistance from this doctrine, for, even if government could exclude State corporations from commerce, it cannot establish a general system of its own (Ch. VI).

As to the proposed plan of Federal license, the argument is unnecessarily complicated. If constitutional rules dividing State and Federal authority be superseded by the doctrine that jurisdiction is a question of power, authority to raise and support armies may be used to turn municipal or State elections; while by its authority over water supply, over the mails, over patents and copyrights, and in other ways, Congress may reach the domestic affairs of every State, and of every home.

Constitutional democracy and the reign of law, end, therefore, in arbitrary government, and the result is announced as a principle of constitutional construction, employed in this instance to protect popular rights against encroachments of monopoly.

No such method of construction has yet received judicial sanction (*ante*, pp. 53–57).

The Anti-trust Act. The great forces which guide the development of society, and the relations of individuals, classes, and communities to each other, and to

government, are beyond control of statute, of judicial precedent, of public opinion itself. We cannot now establish laws suitable to the social organization which shall follow us, nor foresee the forms coming society may assume. One thing, however, we may expect, that the relations of individuals and classes will grow closer, that their mutual dependence will increase, and that the functions of government will extend over individual activities to a greater extent than ever before.

In this new field, the different American communities are likely to follow different courses, some perhaps moving toward State monopoly, as in the case of the South Carolina Dispensary law, others seeking the widest individualism and freest competition possible under new conditions. All these matters of State policy are beyond Federal jurisdiction. Governmental interference with individual activities, accepted because necessary, welcomed by none, demands the completest measure of home rule.

The evils of child labor, of the misuse of insurance funds, — these and many other matters depend for improvement upon the rising intellectual and moral standards of the people. They cannot be reformed from without, nor can public conscience be delegated. The first condition for effective reform is complete local responsibility.

To turn over to a single legislative body the vast intricacies of social life throughout the country, that it may prepare a system applicable to all conditions,— to child labor in the South, for example, and in the tenements of New York, — is not to hasten the adoption of better

methods, but to place important governmental powers in the hands of those who can exercise them with the greatest difficulty and with the least knowledge of local conditions. It is in effect, so far as concerns many vital interests, to abandon the effort for good municipal and State government, and once for all, to intrust local fortune and prosperity to external authority.

It is of great importance in all these matters, and particularly at the present time in commercial affairs, that State jurisdiction be not superseded, but that the Federal Constitution be construed, as it has been, so as to prevent restrictions upon intercourse among the States, at the same time that each State is left free, so far as possible, to follow its own courses in the coming development.

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